Supreme Court, U.S.
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No. 01-___

IN THE
SUPREME COURT OF THE UNITED STATES

MALISSA ANN CRAWLEY,
Petitioner,

v.

GARY D. MAYNARD, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an application for State post-conviction review that is pending before the U.S. Supreme Court in the form of a petition for certiorari an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), the tolling provision of the Antiterrorism and Effective Death Penalty Act?

LIST OF PARTIES

The Petitioner is Malissa Ann Crawley.

The Respondents are Gary D. Maynard, Director, South Carolina Department of Corrections; Charles M. Condon, Attorney General of the State of South Carolina; and Joan B. Meacham, Director, South Carolina Department of Probation, Parole and Pardon Services.

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In a decision that creates a split in authority with the U.S. Court of Appeals for the Third Circuit and misconstrues the nature of this Court's certiorari jurisdiction, the U.S. Court of Appeals for the Fourth Circuit dismissed as untimely Petitioner Malissa Ann Crawley's first and only federal petition for a writ of habeas corpus. The court below held that the time during which Ms. Crawley was petitioning this Court to review the substantial federal issues in her application for State post-conviction review was not tolled by 28 U.S.C. § 2244(d)(2). Ms. Crawley now respectfully prays that a writ of certiorari issue to review that judgment.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported *sub nom. Crawley v. Catoe* at 257 F.3d 395. The opinion is set forth in the Appendix. App. 1. The unreported opinion of the United States District Court for the District of South Carolina is set forth in the Appendix. App. 13. The unreported Report and Recommendation of the Magistrate Judge for the District of South Carolina is set forth in the Appendix. App. 23.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on July 16, 2001. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2244(d)(1):

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to

the judgment of a State court. The limitation period shall run from the latest of–

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(2):

The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2263:

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled–

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if–

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

U.S. Const., Art. III, sec. 2, cl. 2:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

STATEMENT OF THE CASE

I. INTRODUCTION

On January 6, 1992, Malissa Ann Crawley was convicted of violating South Carolina's criminal child endangerment statute. App. 69. Her conviction stemmed from an

unforeseeable interpretation of a statute governing the conduct of "persons having legal custody of a child or helpless person" that was read to criminalize continuing a viable pregnancy during an active addiction. Ruling that the statute was not intended to apply to conduct affecting fetuses, the South Carolina Court of Common Pleas granted Ms. Crawley's state habeas corpus petition. App. 50. After the South Carolina Supreme Court reversed that decision, App. 47, and this Court denied certiorari on May 26, 1998, App. 45, Ms. Crawley filed her first and only federal habeas petition. App. 53. That petition, dated February 26, 1999, was filed well within one year of the conclusion of Ms. Crawley's pursuit of state post-conviction remedies.

II. GUILTY PLEA AND PROBATION

On November 9, 1991, Ms. Crawley gave birth to her son Antwon in a hospital in Anderson, South Carolina. App. 3-4. Later that month, she was arrested pursuant to section 20-7-50 of the South Carolina Children's Code[1] for having criminally endangered Antwon while she was pregnant with him. App. 83. Her offense consisted solely of exposing herself while pregnant to potentially hazardous illicit drugs. App. 83 (Indictment of January 6, 1992, charging that Ms. Crawley had not provided her fetus "adequate shelter" in her uterus). Ms. Crawley pled guilty to the child endangerment charge and was sentenced to a five-year suspended sentence, resulting in five years' probation. App. 69.

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[1] At the time of Ms. Crawley's arrest and conviction, the statute read:

> Any person having legal custody of a child or helpless person, who shall, without lawful exercise, refuse or neglect to provide the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.

S.C. Code Ann. § 20-7-50 (1981).

In 1994, Ms. Crawley's probation was revoked when she pled guilty to a charge of criminal domestic violence following a domestic dispute with her boyfriend. App. 66-67. As a result, on August 5, 1994, she was incarcerated and ordered to serve out the balance of her five-year sentence. App. 4.

III. APPLICATION FOR STATE POST-CONVICTION REVIEW

Ms. Crawley filed a state petition for a writ of habeas corpus on September 25, 1994, asserting that the conduct to which she had pled guilty under S.C. Code Ann. § 20-7-50 was not a criminal offense in South Carolina and that, therefore, she was in custody in violation of the Due Process Clause of the Fourteenth Amendment. App. 60. On October 17, 1994, the South Carolina Court of Common Pleas granted her petition, ruling that the child endangerment statute did not apply to maternal conduct affecting fetuses and noting that "all other circuit court[s] that have addres[s]ed the issue have resolved the issue in favor of the petitioner." App. 49. She was released from prison.

After obtaining state habeas corpus relief, Ms. Crawley began rebuilding her life and the lives of her children. The state, however, appealed. App. 4. Meanwhile, in a subsequent case involving virtually identical facts under section 20-7-50, the South Carolina Supreme Court held, in a 3-2 decision, that the word "child" in section 20-7-50 of the Children's Code includes viable fetuses and therefore "encompasses maternal acts endangering or likely to endanger the life, comfort, or health of a viable fetus." *Whitner v. South Carolina*, 492 S.E.2d 777, 779 (1997), *cert. denied*, 523 U.S. 1145 (1998). The court also summarily concluded that the application of South Carolina's child endangerment statute to the defendant in that case did not violate her federal constitutional right to due process. *See id.* at 784-85. In two separate dissents, Chief Justice Finney and Justice Moore concluded that section 20-7-50 could not

sustain the interpretation imposed on it by the majority. *See id.* at 787 (Finney, C.J., dissenting); *id.* at 787 (Moore, J., dissenting). Justice Moore further concluded that the newly expanded statute was unconstitutionally vague. *See id.* at 788 (Moore, J., dissenting).

On December 1, 1997, relying solely on *Whitner*, the South Carolina Supreme Court reversed the grant of habeas relief to Ms. Crawley and reinstated her conviction, again over the dissents of Chief Justice Finney and Justice Moore. App. 46-47. Her petition for rehearing was denied on January 8, 1998, App. 51, and she was reincarcerated on March 2, 1998. App. 5.

Raising the federal constitutional issues contained in her application for State post-conviction review, Ms. Crawley petitioned this Court for certiorari on March 19, 1998, in a properly filed petition consolidated with *Whitner*. App. 5. This Court denied certiorari on May 26, 1998, App. 45, at which point Ms. Crawley's state habeas action was no longer pending before any court. On February 13, 1999, Ms. Crawley was released on parole.

IV. FEDERAL HABEAS CORPUS PETITION

Ms. Crawley filed her first and only federal petition for a writ of habeas corpus in the U.S. District Court for the District of South Carolina on February 26, 1999. App. 53. The petition alleged that the application of South Carolina's child endangerment statute to Ms. Crawley's prenatal conduct violated her due process rights by failing to give her sufficient notice that this statute criminalized her conduct and by rendering the statute unconstitutionally vague as applied to her. App. 60.

Respondents (the State) moved for summary judgment, arguing in part that Ms. Crawley's petition was untimely filed under 28 U.S.C. § 2244(d)(1) and (2) and that her constitutional claims were meritless. On February 18, 2000, a magistrate judge issued a Report and Recommendation

finding that Ms. Crawley's petition was timely filed; however, the magistrate recommended that summary judgment be entered against Ms. Crawley on the merits of her due process notice and vagueness claims. App. 43.

Following the filing of objections by both Ms. Crawley and the State, on March 22, 2000, the U.S. District Court for the District of South Carolina modified in part and adopted in part the magistrate's Report and Recommendation. App. 21. The district court dismissed Ms. Crawley's petition as untimely, disagreeing with the magistrate's limitation period analysis. App. 15-18. In addition, the district court adopted the magistrate's recommendation that summary judgment be entered against Ms. Crawley on her notice and vagueness claims. App. 20.

Ms. Crawley then timely filed her Notice of Appeal in the U.S. District Court together with a Motion for a Certificate of Appealability, which the District Court granted on May 16, 2000. App. 5.

On July 16, 2001, the U.S. Court of Appeals for the Fourth Circuit affirmed the grant of summary judgment. App. 3. Specifically declining to address the merits of Ms. Crawley's petition, App. 3, the court held that § 2244(d)(2) tolls only the time during which an application for State post-conviction review is pending *in state court*. App. 9. Accordingly, Ms. Crawley's federal habeas petition, filed more than one year after the last *state court* adjudication of her application for State post-conviction review, was held to be untimely. App. 11.

V. STATUTORY FRAMEWORK

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides for a one-year limitation period for federal habeas petitions arising out of all non-capital state convictions. *See* 28 U.S.C. § 2244(d)(1)(A). For prisoners whose convictions became final prior to the enactment of AEDPA on April 24, 1996, a one-year grace period begins on

that date. *See Brown v. Angelone*, 150 F.3d 370, 375 (4th Cir. 1998). Section 2244(d)(2) tolls this one-year limitation period when a "properly filed application for State post-conviction or other collateral review" is pending. 28 U.S.C. § 2244(d)(2).

It is undisputed that Ms. Crawley's state habeas petition constituted an "application for State post-conviction . . . review." App. 7. It is likewise undisputed that her application for State post-conviction review was properly filed and continuously pending from April 24, 1996, the effective date of AEDPA, until January 8, 1998, the date the South Carolina Supreme Court denied her petition for rehearing. App. 7. The State contends that § 2244(d)(2) tolls the limitation period while an application is pending in state court only. Under the State's reading of § 2244(d)(2), Ms. Crawley had until January 8, 1999, to file her federal habeas petition; therefore, her February 26, 1999, petition was untimely.

Ms. Crawley argues that § 2244(d)(2) does not limit the forum in which applications for State post-conviction review must be pursued in order to obtain the benefit of tolling. Thus, the one-year limitation period ran from May 26, 1998, the date this Court denied certiorari with respect to Ms. Crawley's application for State post-conviction review, until May 26, 1999. Therefore, her February 26, 1999, petition was timely.

REASONS FOR GRANTING THE WRIT

In direct conflict with recent rulings from the Court of Appeals for the Third Circuit, the Court of Appeals for the Fourth Circuit interpreted AEDPA's general tolling provision, 28 U.S.C. § 2244(d)(2), to apply to pending applications for State post-conviction review only while they are pending *in state courts*. Instead of giving effect to the plain language of this tolling provision, which contains no forum limitation, the Court of Appeals for the Fourth Circuit

read the provision to track the distinct, explicitly narrower tolling provision that governs capital habeas cases arising in "opt-in" states and which does contain a forum limitation. This conflicting interpretation of a key provision in an important federal statute merits review by this Court.

Furthermore, the ruling of the Court of Appeals is based on a misunderstanding of the nature of this Court's certiorari jurisdiction. Two centuries of cases from this Court have settled that certiorari review is part of this Court's appellate jurisdiction, which "revises and corrects the proceedings in a cause already instituted, and does not create the cause." *Marbury v. Madison*, 5 U.S. 137, 175 (1803). Accordingly, seeking certiorari review of the federal questions contained in an application for State post-conviction review does not transform the underlying state application into a new, federal action. Because the decision below misapprehends the nature of this Court's certiorari jurisdiction, review should be granted.

I. REVIEW IS NECESSARY TO RESOLVE A SPLIT IN AUTHORITY AMONG THREE CIRCUIT COURTS OF APPEALS.

The Court of Appeals for the Fourth Circuit squarely held that "the time the petition for certiorari, which sought review of the adverse decision in the state habeas proceeding, was pending in the United States Supreme Court did not toll the one-year limitations of § 2244(d)(1)." App. 11. This holding, along with an identical holding from the Court of Appeals for the Tenth Circuit, *see Rhine v. Boone*, 182 F.3d 1153 (10th Cir. 1999), *cert. denied*, 528 U.S. 1084 (2000), directly conflicts with controlling authority from the Third Circuit on precisely the same point of law. *See Morris v. Horn*, 187 F.3d 333 (3d Cir. 1999); *cf. Nara v. Frank*, No. 99-3364, 2001 U.S. App. LEXIS 19340 at *22 n.4 (3d Cir. Aug. 30, 2001).

Materially indistinguishable from the procedural posture in this case, *Morris* involved a Pennsylvania state prisoner

who concluded his direct review process on September 22, 1989. *Morris,* 187 F.3d at 336. He then filed a petition for state post-conviction review on April 2, 1990. *See id.* That petition was continuously pending through October 30, 1996, when the Pennsylvania Supreme Court affirmed the denial of relief. *See id.* The petitioner then sought certiorari review in the U.S. Supreme Court of the federal questions in his application for State post-conviction review, and this Court denied that petition on June 23, 1997. *See id.* With his state post-conviction action no longer pending, the petitioner then sought federal habeas relief. *See id.*

On appeal to the Court of Appeals for the Third Circuit, in a unanimous opinion written by Chief Judge Becker, the court tolled the entire time period during which the application for State post-conviction review was pending, through the denial of certiorari on June 23, 1997. *See id.* at 337. The court wrote that the "Commonwealth concedes that Morris's [petition for post-conviction review] was properly filed. Therefore, the statute of limitations was tolled during the pendency of this petition, from April 2, 1990, until June 23, 1997." *Id.* Thus, the statute of limitations for the federal habeas petition "did not begin to run until June 23, 1997," the date on which the U.S. Supreme Court denied certiorari. *Id.* The Third Circuit decision makes clear that the period during which Morris petitioned this Court for certiorari is a stage in the adjudication of "this petition"–i.e., the petition for State post-conviction review.

The Third Circuit has recently cited the holding in *Morris* with approval. In *Nara v. Frank*, No. 99-3364, 2001 U.S. App. LEXIS 19340 (3d Cir. Aug. 30, 2001) (to be published), the petitioner requested that the court toll the ninety-day period during which he could have filed a petition for certiorari to review the federal questions in his application for State post-conviction review. Declining to toll this period, the *Nara* Court distinguished *Morris* by noting that, unlike Nara, the *Morris* petitioner "had sought certiorari review in the Supreme Court of the denial of his post-conviction petition; therefore, the period during which the Supreme

Court considered and denied the writ of certiorari was counted in the tolling analysis." *Id.* at *22 n.4. As Nara had failed to file a petition for certiorari, the Third Circuit refused to toll the limitation period because his application was not "pending." *Id.* at *22.

Only one other circuit has decided a case in which a state prisoner had filed a petition for certiorari and subsequently requested that the petition toll the AEDPA one-year limitation period. In *Rhine v. Boone*, 182 F.3d 1153 (10th Cir. 1999), an Oklahoma prisoner had petitioned the U.S. Supreme Court for certiorari following the Oklahoma Court of Criminal Appeals' affirmance of the trial court's denial of post-conviction relief. *See id.* at 1154. This Court denied certiorari, and the prisoner then filed his federal habeas petition, which would be timely only if the period of certiorari review were tolled. *See id.*

The Tenth Circuit concluded that the habeas petition was untimely. It reached this conclusion, however, by incorporating habeas principles of finality and exhaustion into its analysis of § 2244(d)(2). *See id.* at 1155-56. In contrast to the Third Circuit, the court concluded that "[a] petition for writ of certiorari to the United States Supreme Court is simply not an application for state review of any kind; it is neither an application for state post-conviction review nor an application for other state collateral review." *Id.* at 1156.

To date, the Third, Fourth, and Tenth Circuits are the only federal appellate courts to have addressed this issue. Other courts have addressed the analytically distinct issue of whether to include in the tolling period the time during which a petition for certiorari could have been filed *but was not filed and is hence not pending*. Those courts have universally held that the ninety-day period in which a petitioner could have filed a petition for certiorari but did not is not included in the tolling period. *See Stokes v. District Attorney*, 247 F.3d 539 (3d Cir. 2001), *cert. denied,* No. 01-5619, 2001 U.S. LEXIS 9606 (Oct. 9, 2001); *Snow v. Ault*, 238 F.3d 1033 (8th Cir. 2001), *cert. denied,* 121 S. Ct. 1663 (2001);

Gutierrez v. Schomig, 233 F.3d 490 (7th Cir. 2000), *cert. denied,* 121 S. Ct. 1421 (2001); *Isham v. Randle*, 226 F.3d 691 (6th Cir. 2000), *cert. denied,* 121 S. Ct. 1211 (2001); *Coates v. Byrd*, 211 F.3d 1225 (11th Cir. 2000), *cert. denied,* 121 S. Ct. 1129 (2001); *Ott v. Johnson*, 192 F.3d 510 (5th Cir. 1999), *cert. denied,* 529 U.S. 1099 (2000). These cases are not relevant to Ms. Crawley's claim as they do not involve a "properly filed" or "pending" petition for certiorari, *see* 28 U.S.C. § 2244(d)(2), as Ms. Crawley's case does.

Thus, the holdings of *Crawley* and *Rhine* conflict with the holding of *Morris*. Ms. Crawley's petition should be granted to resolve this conflict. *See* Sup. Ct. R. 10(a).

II. THE FOURTH CIRCUIT'S INTERPRETATION OF A CRITICAL PROVISION OF AEDPA PRESENTS AN IMPORTANT FEDERAL QUESTION THAT REQUIRES GUIDANCE FROM THIS COURT.

28 U.S.C. § 2244(d)(2) is a critically important provision of a new and complex statute that controls state prisoners' access to federal courts. As this Court has twice recognized in the past year, the construction of this provision raises important federal questions that should be settled by this Court.

The Court of Appeals held that post-conviction relief petitions toll the AEDPA limitation period only when they are pending in state court. The confused analysis of § 2244(d)(2) supporting that holding demonstrates the necessity of Supreme Court guidance here. The key phrase at issue in this case–"application for State post-conviction or other collateral review"–describes the legal *remedies* that toll the federal habeas limitation period. This Court recently observed as much, stating that § 2244(d)(2) tolls the limitation period "while state *remedies* are being pursued." *See Duncan v. Walker*, 121 S. Ct. 2120, 2128 (2001) (emphasis added); *see also id.* (Section 2244(d)(2) "toll[s] the limitation period for the pursuit of state *remedies* . . . ." (emphasis added)).

Importantly, the phrase "an application for State post-conviction . . . review" does not limit the *forum* in which the state remedy must be pursued in order to gain the advantage of the tolling provision.[2] The Fourth Circuit essentially rewrote the statute to add words to § 2244(d)(2) so that it would read "an application for post-conviction review *in state court*." It is well settled that courts have no authority to add to Congress' clear words. *See Commissioner v. Lundy*, 516 U.S. 235, 252 (1996) (stating that court cannot rewrite clear statute).

Comparing § 2244(d)(2) to the other tolling provision in AEDPA confirms this reading of the statute. 28 U.S.C. § 2263(b)(2), the parallel tolling provision for state prisoners serving capital sentences in "opt-in" states,[3] specifically includes the state forum requirement that § 2244(d)(2) so noticeably lacks. Given § 2263(b)(2)'s explicit language tolling the limitation period only "until the final State court disposition" of a first State post-conviction petition, the omission of similar language from § 2244(d)(2) indicates that Congress did not intend the general tolling provision to

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[2] Nor did *Duncan v. Walker* impose any such forum requirement. Rather, *Duncan* held that the word "State" in § 2244(d)(2) modifies both "post-conviction" and "other collateral," *see* 121 S. Ct. at 2124, and that an application for federal habeas corpus is not an "application for State . . . other collateral review." *See id.* at 2129. The latter holding was rooted entirely in the fact that a federal habeas petition is a federal remedy, not a state remedy, *see id.* at 2124-27, and did not depend on reading a state forum limitation into § 2244(d)(2). Thus, that holding has no bearing on Ms. Crawley's argument that her "application for State post-conviction . . . review" is a state remedy tolling the limitation period as long as it is pending in any forum.

[3] AEDPA contains a different set of procedural rules for death penalty cases arising out of states that have sufficient guarantees that prisoners under a death sentence received effective state-funded counsel during State post-conviction review proceedings. *See* 28 U.S.C. §§ 2261-66. These provisions are commonly referred to as the "opt-in" provisions of AEDPA. *See, e.g., Booth v. Maryland*, 112 F.3d 139, 140 (4th Cir. 1997).

contain that limitation.[4] *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). There is "no likely explanation for Congress' omission of the word[s]" "final State court disposition" from § 2244(d)(2) other than that Congress did not intend a forum requirement in that provision while it did in § 2263(b)(2). *Cf. Duncan*, 121 S. Ct. at 2125.

In its comparison of § 2244(d)(2) to other sections of AEDPA, the Fourth Circuit again shows the need for clear guidance from this Court with respect to the statute. The Court of Appeals notes that § 2244(d)(1)(A) triggers the one-year limitation period after direct review becomes final, which includes "the denial of a certiorari petition to the United States Supreme Court or the expiration of time for seeking such review." App. 11. The Court then claims that, because § 2244(d)(2) does not contain this same statutory language, the two provisions "do not mean the same [thing]" and thus "§ 2244(d)(2) refers only to the state proceedings rather than to federal proceedings also." App. 11.

This analysis confuses the plain language of these two provisions. Section 2244(d)(1)(A) states that the triggering date for the limitation period is the date on which direct review is "final" or "the expiration of the time for seeking such review." This provision makes no explicit mention of certiorari review. Only by interpreting that provision's use of the word "final" in the context of habeas case law discussing

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[4] Looking at the purpose of the "opt-in" provisions buttresses the plain language comparison. The "opt-in" sections of AEDPA are designed to give states "prompter and more deferential review" in return for greater state protections for death-sentenced prisoners. *Booth*, 112 F.3d at 140. Because the "opt-in" sections are intended to provide for a shorter review process, the obvious deduction is that the general tolling provision applicable to Ms. Crawley is not as limited as the provision governing "opt-in" cases.

the definition of that word, *see, e.g.*, *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987), does the court conclude that the time for petitioning the U.S. Supreme Court for certiorari is included in § 2244(d)(1)(A). In contrast, there is no mention whatsoever of finality in § 2244(d)(2); therefore, there is no basis for reading finality principles into its plainly dissimilar statutory language. *See Lundy*, 516 U.S. at 235.

The significance of the comparison between § 2244(d)(2) and § 2244(d)(1)(A) lies elsewhere: the comparison provides support for the cases cited above that do not toll the time during which a state prisoner could have, but did not, file a petition for certiorari to this Court following the denial of State post-conviction review. Section 2244(d)(2) refers to applications that are "pending," whereas § 2244(d)(1)(A) refers to the "conclusion of direct review or the expiration of the time for seeking such review." With that last clause–"or the expiration of the time for seeking such review"–§ 2244(d)(1)(A) goes beyond § 2244(d)(2) by including the time during which a prisoner could seek review but does not; in contrast, § 2244(d)(2) requires that a petition actually be "pending." The dissimilarity in language of these two provisions in § 2244(d) thus indeed describes two different time periods, but this difference has no significance for cases like Ms. Crawley's in which a petition for certiorari was actually filed.

The Court of Appeals further confuses the interpretation of § 2244(d)(2) by importing the legal framework of exhaustion of state remedies into the plain words of the tolling provision. The Fourth Circuit reasons that because seeking review in the U.S. Supreme Court from the denial of an application for State post-conviction review is not necessary in order to exhaust state remedies, the limitation period must therefore run while the U.S. Supreme Court considers the application for State post-conviction review. *See* App. 10-11 (citing *Fay v. Noia*, 372 U.S. 391, 435-38 (1963)). In other words, according to the Fourth Circuit, because a petition for certiorari is not required for

exhaustion, it must not be included in the tolling period either.

Simply put, that conclusion is a policy judgment and should not control the otherwise plain language of the statute. *See Artuz v. Bennett*, 531 U.S. 4, 10 (2000) (rebuffing attempts to import exhaustion principles into § 2244(d)(2) as "policy arguments" beyond "the province of this Court . . . to accommodate"). Section 2244(d)(2) simply does not state that the tolling period includes only the stages of review required for exhaustion. Nor does the tolling provision include any language referring to a forum requirement, whereas the exhaustion section of AEDPA explicitly does. *See* 28 U.S.C. § 2254(b)(1)(A) (requiring exhaustion of "remedies available *in the courts of the State*" (emphasis added)); *see also Fay v. Noia*, 372 U.S. at 436 ("Section 2254 speaks only of 'remedies available in the courts of the State.'"). If Congress had wanted the concept of exhaustion under 28 U.S.C. § 2254(b)(1)(A) to control the construction of AEDPA's general tolling provision, it would have included clear words to that effect in § 2244(d)(2).

Certiorari's relevance to the direct appeal process further illustrates this point. Petitioning the U.S. Supreme Court for certiorari during the direct appeal stage of the criminal process is not required for the exhaustion of state remedies. *See* 28 U.S.C. § 2254(a); *County Court of Ulster County v. Allen*, 442 U.S. 140, 150 n.7 (1979) ("[T]here is no statutory requirement of an appeal [during direct review] to this Court as a predicate to habeas jurisdiction."). Nonetheless, by placing the word "final" in the text of § 2244(d)(1)(A), Congress did incorporate the period during which certiorari could be sought into the period of direct review, hence delaying the running of the limitation period until that time had elapsed. *See Harris v. Hutchinson*, 209 F.3d 325, 328 n.1 (4th Cir. 2000) (including the certiorari period in § 2244(d)(1)(A)'s time period); *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999) (same). This analysis demonstrates what this Court has already held: exhaustion principles do

not control the analysis of AEDPA's limitation period. *See Artuz*, 531 U.S. at 10.

By Congressional design, a prisoner need not file a petition for certiorari with the U.S. Supreme Court in order to exhaust state remedies, but if the prisoner elects to do so, as she is entitled to under 28 U.S.C. § 1257(a), that time is tolled. The Fourth Circuit's confusion of exhaustion and finality principles with the limitation period mixes apples and oranges.

The complex statutory language contained in AEDPA's tolling provision has proven difficult for lower courts to interpret. Understanding the importance of developing a clear interpretation of this new statute, this Court has already stepped in to decide two important issues under § 2244(d)(2) on which circuit courts have split. *See Duncan v. Walker*, 121 S. Ct. 2120 (2001) (holding that a federal habeas petition does not toll the limitation period under § 2244(d)(2)); *Artuz v. Bennett*, 531 U.S. 4 (2000) (holding that the term "properly filed" does not include substantive rules regarding procedural default but merely includes procedural conditions to filing).

By virtue of granting certiorari in both cases, this Court recognized the important federal issues presented by the language of § 2244(d)(2). However, both of those cases left open Ms. Crawley's question, as Justice Breyer has noted. *See Duncan*, 121 S. Ct. at 2132-33 (Breyer, J., dissenting). Because this case raises that precise question of federal law requiring guidance from this Court, Ms. Crawley's petition should be granted. *See* Sup. Ct. R. 10(c).

III. THE COURT OF APPEALS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH TWO CENTURIES OF LAW FROM THIS COURT ABOUT THE NATURE OF ITS APPELLATE AND CERTIORARI JURISDICTION.

As § 2244(d)(2) does not contain a forum requirement and instead refers only to the remedies that toll the limitation

period, the controlling inquiry is whether a petition for certiorari to the U.S. Supreme Court following the denial of an application for State post-conviction review by the highest court of a state converts the underlying action from "an application for State post-conviction . . . review" to some other form of action. This question goes to the heart of this Court's certiorari jurisdiction.

Without close analysis, the Court of Appeals for the Fourth Circuit concluded that a "'petition for writ of certiorari to the United States Supreme Court is simply not an application for state review . . . .'" App. 10 (quoting *Rhine v. Boone*, 182 F.3d at 1156). That conclusion contradicts two centuries of cases from this Court that indicate unequivocally that certiorari is the final step in an appellate process and does not initiate a new action.

It is well established that, through Article III, this Court has two types of jurisdiction–original and appellate. Original jurisdiction is limited to cases involving ambassadors, public ministers and consuls, and those in which a state is a party. *See* U.S. Const. art. III, § 2, cl. 2. Subject to Congressional regulation, this Court's appellate jurisdiction extends to all other cases within the judicial power of the United States, *see id.*, including state court cases raising federal issues. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 351 (1816) (Supreme Court's "appellate power . . . extend[s] to cases pending in the state courts.").

By statutory definition and this Court's own description, a writ of certiorari brings a case before the Court as if it were brought on a writ of error or appeal.[5] Thus, the following

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[5] Prior to 1891, this Court's appellate jurisdiction consisted of cases brought to it by writs of error or appeal. *See* Judiciary Act of 1789, §§ 22, 25, 1 Stat. 73, 84-87. In 1891, Congress added the statutory writ of certiorari as a discretionary avenue of review in federal cases that gave this Court "the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." Judiciary Act of March 3, 1891, § 6, 26 Stat. 826, 828. When the Judiciary Act was rewritten in 1914 to include in this Court's certiorari jurisdiction cases

description of the function of writs of error or appeal is applicable to certiorari:

> [Jurisdiction] does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. . . . *The mode of removal is form, and not substance.* Whether it be by writ of error or appeal, no claim is asserted, no demand is made by the original [party]; he only asserts the constitutional right to have his defence [sic] examined by that tribunal whose province it is to construe the constitution and laws of the Union.

Cohens v. Virginia, 19 U.S. 264, 410-11 (1821) (emphasis added). Certiorari, then, acts only on the record, not on the substance of the case.[6]

The principle that certiorari review does not change the substantive nature of a case has its roots in *Marbury v. Madison*. There, Chief Justice Marshall wrote that "[i]t is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create the cause." 5 U.S. 137, 175 (1803). Certiorari following a final decision in state court is undoubtedly part of the appellate jurisdiction of this Court.

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originating in state courts, Congress included the same language: the Court was given "the same power in the case as if it had been carried by appeal or writ of error to the Supreme Court." Act of Dec. 23, 1914, ch. 2, 38 Stat. 790; *accord Forsyth v. Hammond*, 166 U.S. 506, 513 (1897) (stating that statutory writ of certiorari gives Court "all the power and authority over [the case] which this court would have in any case brought to it by appeal or writ of error"). By 1948, when the Court's jurisdiction was codified at 28 U.S.C. §§ 1251-57, *see* Act of June 25, 1948, Part IV, ch. 81, 62 Stat. 927, this principle was so well settled that this descriptive language was omitted "as unnecessary." *See* 28 U.S.C.S. § 1257 at 413 (Law. Co-op. 2001).

[6] The definition of "certiorari" comports with this case law. *See Black's Law Dictionary* 220 (7th ed. 1999) (defining "certiorari" as a "writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review").

See U.S. Const., Art. III, § 2, cl. 2; Judiciary Act of March 3, 1911, § 236, 36 Stat. 1152, 1156 (introducing subsequent provisions as a list of Court's "appellate jurisdiction"); *see also* William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 Yale L.J. 1, 7 (1925) (listing certiorari to a state supreme court as one aspect of the "entire appellate jurisdiction of the Supreme Court"). Thus, certiorari does not "create the cause" but rather is the final step "in a cause already instituted." *Marbury*, 5 U.S. at 175.[7]

Contrary to the Fourth Circuit's holding in this case, petitioning the U.S. Supreme Court for certiorari from the denial of State post-conviction review does not change the underlying action or the nature of the remedy sought. As Ms. Crawley's state habeas petition began in state court as an "application for State post-conviction . . . review," it remained such an application when Ms. Crawley asked this Court to review the federal constitutional questions at issue in her case. The Fourth Circuit's conclusion to the contrary contradicts *Marbury*'s fundamental principle that appellate jurisdiction does not "create the cause" and *Cohens v. Virginia*'s observation that a writ of error, after which certiorari was modeled, "acts only on the record" and is "not [a matter of] substance." Here, as in all cases originating in state court that are presented to this Court for review, the petition for a writ of certiorari *merely shifted the forum* of the case from state court to federal court for final review; it did not change the underlying nature of the case. Ms. Crawley's petition to the U.S. Supreme Court, asking the Court to review the federal issues presented by her State post-conviction relief application under 28 U.S.C. § 1257(a), was

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[7] As a treatise on the jurisdiction of the Supreme Court referred to it, certiorari is a way for this Court to exercise "final control over litigation . . . in every state court in so far as federal questions are involved . . . ." Richard F. Wolfson & Philip B. Kurland, *Jurisdiction of the Supreme Court of the United States* § 308 at 587 (1951).

thus the final step in her ongoing "application for State post-conviction . . . review."[8]

Indeed, the language this Court uses to describe cases pending before it on a writ of certiorari confirms that a case before it on certiorari is the same case that was heard by the court below. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 85 (1963) (stating that petitioner's case asking for State post-conviction relief was "here on certiorari"); *Herndon v. Lowry*, 301 U.S. 242, 247 (1937) (referring to the State post-conviction review decisions by the state court as part of "the present proceeding"); *Holmes v. Jennison*, 39 U.S. 540, 568 (1840) (using the phrase, "[t]he case being thus before this Court" in referring to a state habeas action).

Therefore, certiorari is also warranted in this case because the Fourth Circuit's conclusion that Ms. Crawley's petition for certiorari was not a procedural step in the ongoing adjudication of her "application for State post-conviction . . . review" conflicts with bedrock principles of this Court's jurisdiction. *See* Sup. Ct. R. 10(c).

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[8] In fact, the opinion below begs the question: If the state habeas action awaiting certiorari review in the U.S. Supreme Court was not an "application for State post-conviction . . . review," then what was it? The state habeas action certainly did not become a new, original action in the Supreme Court, as those are limited to a very small category of cases not implicated here. *See* 28 U.S.C. § 1251; U.S. Const. art. III, § 2, cl. 2. It was also not a form of direct review of the conviction because that process had ended years earlier when Ms. Crawley did not appeal her guilty plea. App. 4. Likewise, the petition was not a form of federal habeas review because that process had not yet begun. App. 5. The only possibility is that the petition for certiorari was a continuation of Ms. Crawley's "application for State post-conviction . . . review."

CONCLUSION

For the foregoing reasons, Ms. Crawley respectfully requests that the Court grant her petition for a writ of certiorari.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MALISSA ANN CRAWLEY,

Petitioner-Appellant,

v.

WILLIAM D. CATOE, Director-Designate, Department of Corrections, State of South Carolina; ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,

Respondents-Appellees.

AMERICAN PUBLIC HEALTH ASSOCIATION; SOUTH CAROLINA MEDICAL ASSOCIATION; AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS; AMERICAN NURSES ASSOCIATION; ALLIANCE FOR SOUTH CAROLINA'S CHILDREN; NATIONAL ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE COUNSELORS; SOUTH CAROLINA ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE COUNSELORS; SOUTH CAROLINA NURSES ASSOCIATION; AMERICAN MEDICAL WOMEN'S ASSOCIATION; NATIONAL ASSOCIATION OF SOCIAL WORKERS, INCORPORATED; SOCIETY OF GENERAL INTERNAL MEDICINE; AMERICAN ACADEMY ON PHYSICIAN AND PATIENT; THE CONSORTIUM FOR SUBSTANCE ABUSING WOMEN AND THEIR CHILDREN;

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ASSOCIATION FOR MEDICAL EDUCATION AND RESEARCH IN SUBSTANCE ABUSE; ASSOCIATION OF REPRODUCTIVE HEALTH PROFESSIONALS; NATIONAL FAMILY PRESERVATION NETWORK; NATIONAL CENTER FOR YOUTH LAW; LEGAL SERVICES FOR PRISONERS WITH CHILDREN; INSTITUTE FOR HEALTH AND RECOVERY; NOW LEGAL DEFENSE AND EDUCATION FUND; 52 PERCENT; LEGAL ACTION CENTER,

Amici Curiae.

No. 00-6594

Appeal from the United States District Court
for the District of South Carolina, at Florence.
G. Ross Anderson, Jr., District Judge.
(CA-99-527-4-13BF).

Argued: December 7, 2000

Decided: July 16, 2001

Before WIDENER and KING, Circuit Judges, and
HAMILTON, Senior Circuit Judge.

Affirmed by published opinion. Judge Widener wrote the opinion, in which Judge King and Senior Judge Hamilton concurred.

COUNSEL

ARGUED: Susan Frietsche, WOMEN'S LAW PROJECT, Philadelphia, Pennsylvania, for Appellant. Tracey Colton Green, OFFICE OF THE ATTORNEY GENERAL, Columbia, South Carolina, for Appel-

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lees. **ON BRIEF:** David S. Cohen, Lynn M. Paltrow, WOMEN'S LAW PROJECT, Philadelphia, Pennsylvania; Seth Kreimer, Philadelphia, Pennsylvania; C. Rauch Wise, Greenwood, South Carolina; David Rudovsky, KAIRYS, RUDOVSKY, EPSTEIN, MESSING & RAU, Philadelphia, Pennsylvania, for Appellant. Charles M. Condon, Attorney General, John W. McIntosh, Chief Deputy Attorney General, Donald J. Zelenka, Assistant Deputy Attorney General,

OFFICE OF THE ATTORNEY GENERAL, Columbia, South Carolina, for Appellees. Daniel N. Abrahamson, San Francisco, California, for Amici Curiae.

OPINION

WIDENER, Circuit Judge:

Malissa Ann Crawley appeals from a decision of the United States District Court for the District of South Carolina denying her petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Crawley's petition challenges her conviction on due process grounds, alleging that she had no notice that the statute under which she was convicted applied to her conduct and that the statute as interpreted is unconstitutionally vague. The district court dismissed Crawley's petition as untimely under the one-year limitations period of 28 U.S.C. § 2244(d) and also rejected the merits of her petition. Crawley argues that the district court misinterpreted the tolling provision of 28 U.S.C. § 2244(d)(2) by failing to toll the statute of limitations for the period during which her petition was pending in the United States Supreme Court for writ of certiorari to review the South Carolina Supreme Court's denial of her state habeas corpus application. Because we agree with the district court that 28 U.S.C. § 2244(d)(2) did not toll the one-year limitations period while Crawley's petition for writ of certiorari was pending, we affirm without considering the merits of Crawley's petition for habeas corpus.

I.

The operative facts in this matter are not disputed. On November 9, 1991, Malissa Ann Crawley gave birth to her son at Anderson Hos-

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pital in South Carolina. That same month, Crawley was charged with "unlawful neglect of a child" pursuant to S.C. Code § 20-7-50, 20-7-490 (1985), on the grounds that she allegedly took cocaine or crack cocaine while she was pregnant, endangering her fetus. Crawley waived grand jury presentment and pleaded guilty as charged. On January 6, 1992, Crawley was sentenced to five years in prison which was suspended, resulting in five years of probation. Crawley did not appeal her conviction or her sentence.

On July 15, 1994, Crawley was charged with criminal domestic violence. She pleaded guilty to the charge. As a result, on August 5, 1994, a South Carolina judge revoked her probation and ordered her to begin serving her five-year sentence. Crawley did not appeal the revocation of her probation.

Crawley filed her first and only state application for habeas corpus relief on September 25, 1994, asserting that, because child endangerment does not extend to a fetus, the act to which she pleaded guilty, under S.C. Code § 20-7-50, 20-7-490 (1985),"[was] not a crime in South Carolina" and that she was in custody in violation of the South Carolina constitution and the Due Process Clause of the Fourteenth Amendment. A South Carolina trial court granted Crawley's application on October 17, 1994. The South Carolina Supreme Court held the state's appeal of this decision in abeyance until it resolved the appeal of another case raising the same issues as Crawley's application. The South Carolina Supreme Court decided in that case, *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), that a viable fetus is a "child" within the meaning of the child abuse and endangerment statute.

Citing its decision in the *Whitner* case, the South Carolina Supreme Court reversed the trial court's decision to grant Crawley's application for state habeas relief and reinstated Crawley's conviction and sentence on December 1, 1997. *Crawley v. Evatt*, No. 97-MO-117 (S.C. Dec. 1, 1997). The South Carolina Supreme Court denied Crawley's motion for

rehearing on January 8, 1998. On March 2, 1998, after both the South Carolina Supreme Court and the United States Supreme Court denied her request for bail pending her petition for a writ of certiorari, Crawley was reincarcerated.

Crawley's petition for certiorari to review the adverse habeas decision of the South Carolina Supreme Court, consolidated with Whit-

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ner's, was timely filed in the United States Supreme Court on March 19, 1998. In a memorandum order of May 26, 1998, the United States Supreme Court denied Crawley's petition for certiorari. *Whitner v. South Carolina* and *Crawley v. South Carolina*, 523 U.S. 1145 (1998).

Crawley filed her first and only petition for a writ of habeas corpus in federal court on February 26, 1999, again challenging her conviction on the grounds that South Carolina's interpretation of the child endangerment statute, extending the statute to include endangerment of a fetus, violated due process because she had no notice that the statute extended to her conduct and that the statute, as interpreted, was unconstitutionally vague. The district court dismissed Crawley's petition as untimely on March 27, 2000. In addition, the district court entered summary judgment against Crawley on the merits of her notice and vagueness claims. Crawley timely filed her notice of appeal with the U.S. District Court for the District of South Carolina on April 24, 2000, together with a motion for a certificate of appealability which this court granted on May 16, 2000.

II.

The construction of the statute of limitations of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA), is a question of law that this Court reviews de novo. See *Taylor v. Lee*, 186

F.3d 557, 559 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1262 (2000).

The Antiterrorism and Effective Death Penalty Act of 1996 imposed a new, one-year statute of limitations on petitions brought by state prisoners for a federal writ of habeas corpus.[1] See 28 U.S.C.

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§ 2244(d). In Crawley's case, this limitations period ran from the date on which the criminal judgment against her "became final by the conclusion of direct review or the expiration of the time for seeking such review." See 28 U.S.C. § 2244(d)(1)(A). Crawley's January 6, 1992, conviction for "unlawful neglect of a child," from which she did not appeal, became final long before the April 24, 1996, effective date of the AEDPA. We have decided that, in the case of a habeas challenge to a state conviction that became final prior to the enactment of the AEDPA, a habeas petitioner is entitled to a one-year grace period from the effective date of the Act, April 24, 1996, in which to file a federal habeas petition. See

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[1] The relevant section of AEDPA codified at 28 U.S.C. § 2244(d) provides, in pertinent part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > * * *
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Brown v. Angelone, 150 F.3d 370, 375 (4th Cir. 1998). Thus, Crawley's one-year limitations period ran from April 24, 1996.

AEDPA also provides, however, that this one-year limitations period is tolled while "a properly filed application for State postconviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). Crawley's application for state post-conviction relief was continuously pending before the South Carolina courts from before the April 24, 1996, effective date of the AEDPA until January 8, 1998, when the South Carolina Supreme Court denied her request for rehearing. The parties are in agreement that the one-year limitations period was tolled during this time period.

The district court held that this tolling period ended on January 8, 1998, and dismissed Crawley's February 26, 1999, petition for a federal writ of habeas corpus as untimely. Crawley argues, however, that her petition for certiorari to the United States Supreme Court seeking review of the South Carolina Supreme Court's decision to reject her application for state habeas corpus relief was "a properly filed application for other collateral review" which was "pending" and which tolled the limitations period. If we accept Crawley's argument, the

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one-year limitations period was tolled at least during the period from March 19 until May 26, 1998, when the Supreme Court denied certiorari, and her petition was timely.

While this appeal poses a question of first impression in this Circuit, several other circuits have considered and rejected similar arguments. In *Rhine v. Boone*, 182 F.3d 1153 (10th Cir. 1999), the Tenth Circuit concluded, on these same facts, that the one-year limitations period was not tolled during the period that a petition for writ of certiorari to

review denial of state habeas corpus relief was pending before the United States Supreme Court.

Other courts have considered a similar argument to that raised by Crawley on a slightly different factual basis. In those cases, a habeas corpus petitioner who never filed a petition for writ of certiorari to the United States Supreme Court to review his state habeas corpus application argued that the statue of limitations was tolled during the 90-day period in which such a petition timely could have been filed. The Seventh Circuit rejected a tolling argument in this context on the ground that, where no petition for writ of certiorari has been filed, there was neither a "properly filed" nor a "pending" application for other collateral review within the meaning of 28 U.S.C. § 2244(d)(2). *Gutierrez v. Schomig*, 233 F.3d 490 (7th Cir. 2000); see also *Stokes v. Dist. Att'y of Philadelphia*, 247 F.3d 539 (3d Cir. 2001) (citing *Gutierrez* as alternate ground for its holding, but also relying on reasoning more akin to *Rhine*).

Other circuits to consider similar fact situations have rejected tolling arguments on the same reasoning adopted by the Tenth Circuit in *Rhine v. Boone*, 182 F.3d 1153, that proceedings before the United States Supreme Court seeking review of a state habeas corpus application do not toll the one-year limitations period. See *Stokes*, *supra*; *Ott v. Johnson*, 192 F.3d 510 (5th Cir. 1999); *Isham v. Randle*, 226 F.3d 691 (6th Cir. 2000); *Snow v. Ault*, 238 F.3d 1033 (8th Cir. 2001); *Bunney v. Mitchell*, 241 F.3d 1151, 1156 (9th Cir. 2001); and *Coates v. Byrd*, 211 F.3d 1225, 1226-27 (11th Cir. 2000). And the foregoing list of cases is not necessarily exclusive.

All of the courts of appeal considering the question have come to a like conclusion. Following the denial of relief in the state courts in

state habeas proceedings, neither the time for filing a petition for certiorari in the United States Supreme Court, nor the time a petition for certiorari is considered by the United States Supreme Court, is tolled under 28 U.S.C. § 2244(d)(2) from the one-year statute of limitations under § 2244(d)(1). In our case, the petition for certiorari to review the adverse habeas decision of the South Carolina Supreme Court was properly filed on March 19, 1998 and was pending in the United States Supreme Court from then until it was denied on May 26, 1998. We now hold that the period from March 19, 1998 until May 26, 1998 does not toll the statute of limitations under § 2244(d)(2). We come to this conclusion for the following reasons.

In a case on only slightly different facts, the Supreme Court has recently construed the language of 28 U.S.C. § 2244(d)(2). In *Duncan v. Walker*, __ U.S. __, 2001 WL 672270 (U.S. June 18, 2001) (No. 00-121), the Court reversed a decision of the Second Circuit which held that a federal habeas petition, properly filed and pending in the district court, filed under 28 U.S.C. § 2254, tolled the period of the statute of limitations under 28 U.S.C. § 2244(d)(2) the same as would have a properly filed state habeas petition. See *Walker v. Artuz*, 208 F.3d 357 (2nd Cir. 2000), reversed by *Duncan v. Walker*, __ U.S. __, 2001 WL 672270 (U.S. June 18, 2001) (No. 00-121).[2] The Court read 28 U.S.C. § 2244(d)(2) so that "the word 'State' applies to the entire phrase 'post-conviction or other collateral review.'" *Duncan v. Walker*, __ U.S. __, 2001 WL 672270, slip op. at 4. Because federal habeas corpus proceedings are neither state post-conviction review nor other state collateral review, the Court held that they do not toll the one-year limitations period under 28 U.S.C. § 2244(d)(2).

This was the same construction of 28 U.S.C. § 2244(d)(2) reached by the Tenth Circuit in *Rhine v. Boone*. See *Rhine v.*

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[2] The Tenth Circuit, in *Petrick v. Martin*, 236 F.3d 624 (10th Cir. 2001), followed *Walker* without overruling *Rhine*, which we note in passing.

Boone, 182 F.3d at 1156 ("We are satisfied that, in the wording of § 2244(d)(2), 'State' modifies the phrase 'post-conviction review' and the phrase 'other collateral review.'"). We are in agreement with the Tenth Circuit that "[a] petition for writ of certiorari to the United States Supreme Court is simply not an application for state review of any kind; it is neither

an application for state post-conviction review nor an application for other state collateral review." *Rhine v. Boone*, 182 F.3d at 1156. We further agree with the reasoning of the Tenth Circuit that:

> the term "pending" in § 2244(d)(2) must be construed to encompass all of the time during which a state prisoner is attempting, *through proper use of state court procedures*, to exhaust *state court remedies* with regard to a particular post-conviction application.

Rhine, 182 F.3d at 1155 (italics in original) (internal quotations omitted).

The rule of exhaustion of state remedies is a long-standing federal procedural rule which has been codified at least since 1948 and presently is 28 U.S.C. § 2254(b)(1). So a prisoner seeking federal habeas relief from a state conviction may not file his request for the same until after he has exhausted his remedies in the state courts. The Supreme Court decided some years ago, in *Fay v. Noia*, 372 U.S. 391, 435-38 (1963), that such a prisoner was not required to seek review in the United States Supreme Court of a denial of habeas relief by the state courts as a part of the exhaustion of state remedies. It held this because a petition for certiorari to the United States Supreme Court was not a part of state exhaustion, the United States Supreme Court "is not the court of any State," *Fay*, 372 U.S. at 436. No reason is shown to

treat a petition of certiorari in the United States Supreme Court differently here.

Under the same statute at issue here, the limitation of action begins to run when the conviction is final under § 2244(d)(1)(A) only when the availability of a direct appeal has been exhausted, which includes the denial of a certiorari petition to the United States Supreme Court or the expiration of time for seeking such review. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987); *Harris v. Hutchinson*, 209 F.3d 325, 328 (4th Cir. 2000). The wording of § 2244(d)(2) differs from that of § 2244(d)(1)(A) in that the statute of limitations is tolled during a properly filed and pending application "for state post-conviction or other collateral review." The very difference of wording in the two code sections indicates that they do not mean the same and is an indication that § 2244(d)(2) refers only to the state proceedings rather

than to federal proceedings also. Certainly the wording of the statute is not a model of clarity. See Strunk and White, *The Elements of Style* § 20 (3d ed. 1979). Being unclear, it should be construed consistent with the statutory purpose of "curbing the abuse of the statutory writ of habeas corpus." H.R. Rep. 104-518, *reprinted in* 1996 U.S.C.C.A.N. 944. As noted, since *Fay v. Noia* unmistakably held that a petition for certiorari to the United States Supreme Court was not a part of the exhaustion of state remedies, no reason is seen to treat such a petition differently here.

We hold that the time the petition for certiorari, which sought review of the adverse decision in the state habeas proceeding, was pending in the United States Supreme Court did not toll the one-year limitations of § 2244(d)(1).[3]

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[3] Crawley's brief, p.16, claims that all of the period between January 8, 1998 and May 26, 1998 was tolled. We need not decide that question because if the time the petition was actually pending in the Supreme

The judgment of the district court dismissing the petition as out of time is accordingly

AFFIRMED.[4]

Court, March 19 until May 26, 1998, counted toward tolling, that would have been sufficient.

[4] The motion of Crawley, filed December 20, 2000, to strike the letter from Catoe, et al., is granted.

FILED March 22, 2000
LARRY W. PROPES, CLERK
FLORENCE, S.C.

UNITED STATES DISTRCT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Malissa Crawley, #212641,	:	
	:	
Petitioner,	:	
v.	:	
	:	
William D. Catoe, Department of Corrections, State of South Carolina; Charles M. Condon, Attorney General of the State of South Carolina; and Stephen K. Benjamin, South Carolina Department of Probation, Parole and Pardon Services,	:	C/A No. 4:99-527-13BF
	:	
	:	ORDER
	:	
	:	
	:	
	:	
	:	
Respondents.	:	

This matter is before the Court for a review of the magistrate's Report and Recommendation made in accordance with 28 U.S.C. § 636 and Local Rule 73.02, D.S.C., and filed February 18, 2000.

I. BACKGROUND

Petitioner brought this action seeking relief pursuant to 28 U.S.C. § 2254. On May 21, 1999, Respondents filed a motion for summary judgment based on the following grounds: (1) that the petition is barred by the one-year statute

of limitations in 28 U.S.C. § 2244(d);[1] (2) that Petitioner has defaulted her federal constitutional

claims; and (3) that even if the petition is properly before the court, (a) Petitioner's voluntary guilty plea waived any due process challenge or allegation that she lacked notice that S.C. Code Ann. § 20-7-50 proscribed her conduct, (b) Petitioner's conviction, at any rate, satisfied due process because previous decisions of the South Carolina Supreme Court gave Petitioner notice that S.C. Code Ann. § 20-7-50 proscribed her conduct, and (c) S.C. Code Ann. § 20-7-50 is not impermissibly vague. Although the magistrate recommends not finding Petitioner's claim untimely or procedurally barred, the magistrate recommends granting Respondents' motion for summary judgment and dismissing Petitioner's claim without an evidentiary hearing because

---

[1] 28 U.S.C. § 2244(d) provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Petitioner's conviction did not violate due process and S.C. Code Ann. § 20-7-50 is not unconstitutionally vague.

II. STANDARD OF REVIEW

The magistrate makes only a recommendation to this Court. The

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recommendation has no presumptive weight, and responsibility for making a final determination remains with this Court. *Mathews v. Weber* 423 U.S. 261, 270-71 (1976). This Court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made, and this Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). This Court may also "receive further evidence or recommit the matter to the magistrate with instructions." *Id.* Both Respondents and Petitioner object to the Report and Recommendation.

III. DISCUSSION

A. Respondents' Objections

1. Statute of Limitations

Respondents object to the magistrate's conclusion that Petitioner's claim is not barred by the statute of limitations in 28 U.S.C. § 2244(d). In their motion for summary judgment, Respondents relied on *Moseley v. Freeman,* 977 F. Supp. 733 (M.D.N.C. 1997), for the proposition that an action for state post-conviction review (PCR) is not pending during the time for seeking a writ of certiorari from the United States Supreme Court, thereby precluding the tolling of that time under 28 U.S.C. § 2244(d)(2). Petitioner argued that *Moseley* was inapplicable because the court was not interpreting §

2244(d)(2). While the magistrate stated that Respondents' argument was not without merit, the magistrate recommends following prior precedent in this district holding that a petition for a writ of certiorari in the United States Supreme

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Court in a state PCR action tolls the statute of limitations pursuant to § 2244(d)(2). See *Whitner v. Moore,* No. 2:98-3564-23AJ (D.S.C. Sept. 24, 1999).

In support of their objection to the magistrate's conclusion that Petitioner's claim is not time barred, Respondents point to two courts of appeals decisions that directly contravene Petitioner's position and the district court's holding in *Whitner. See Ott v. Johnson,* 192 F.3d 510 (5th Cir. 1999); *Rhine v. Boone,* 182 F.3d 1153 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 808 (2000).[2]

In *Rhine*, the Tenth Circuit specifically held:

> The time after the [highest state court to rule on the matter] finally denied [the petitioner's state] post-conviction application until the United States Supreme Court denied his petition for certiorari was not "time during which a properly filed application for State post-conviction . . . review . . . [was] pending," and, therefore, it should be counted toward the one-year limitation period.

182 F.3d at 1155 (some alteration in original) (quoting 28 U.S.C. § 2244(d)(2)). The court distinguished § 2244(d)(2) from § 2244(d)(1)(A), which explicitly accounts for the time during which a convict can petition the United States

---

[2] *Rhine* was decided on July 7, 1999, four months after Respondents filed their objections to the magistrate's Report and Recommendation in *Whitner,* and *Ott* was decided on October 21, 1999, one month after the district court issued its order in *Whitner.*

Supreme Court for direct review in determining when a conviction becomes final for purposes of setting the time from which the statute of limitations for filing a federal PCR action runs. The court explained its rationale and the reasoning behind this distinction:

> It would not be in the interest of judicial efficiency to require a prisoner to begin post-conviction proceedings before his judgment of conviction was final, and that is why the relevant statutes hinge the running of the

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> limitation period on the finality of the judgment of conviction, see 28 U.S.C. §§ 2244(d)(1)(A), 2255(1).
>
> The same rationale does not extend, however, to the tolling provision of § 2244(d)(2). The state post-conviction proceeding is final after the state's highest court has addressed the application. Exhaustion of state remedies, which is a pre-condition to the ability to petition for a writ of habeas corpus, does not include a direct appeal to the United States Supreme Court from the state's denial of post-conviction relief, and neither is a federal court's jurisdiction to entertain a habeas petition affected by whether or not review of the state's denial of post-conviction relief is sought in the Supreme Court. The tolling provision specifically refers to a properly filed application for "State post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2). We are satisfied that in the wording of § 2244(d)(2), "State" modifies the phrase "post-conviction review" and the phase "other collateral review." A petition for writ of certiorari to the United States Supreme Court is simply not an application for state review of any kind; it is neither an application for state post-conviction review nor an application for other state collateral review.

Id. at 1156 (one citation omitted).

In *Ott*, the Fifth Circuit reached the same conclusion upon the same rationale. *See* 192 F.3d at 513 (citing *Rhine*, 182 F.3d at 1155, 1156).

The Fourth Circuit has not ruled on the issue of whether the time for seeking a writ of certiorari from the United States Supreme Court for review of a state PCR action tolls the statute of limitations for filing a federal habeas corpus petition pursuant to 28 U.S.C. § 2244(d)(2).[3] Therefore, this Court will follow the precedent of the only two circuit courts that have specifically ruled on the issue and hold that the time after which a state finally denies a petitioner's petition for state post-conviction relief until

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the United States Supreme Court denies the petitioner's petition for certiorari is not tolled under 28 U.S.C. § 2244(d)(2). Consequently, we agree with Respondents that Petitioner's habeas corpus petition in this case should be dismissed in its entirety as untimely.

2. Procedural Default

Respondents object to the magistrate's conclusion that Petitioner did not default her federal constitutional claims. The magistrate relied on *Coleman v. Thompson*, 501 U.S. 722 (1991), in which the Supreme Court held:

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[3] In *Taylor v. Lee*, 186 F.3d 557 (4th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3367 (2000), the Fourth Circuit, following precedent from the Ninth Circuit and Tenth Circuit, held that the entire period of state post-conviction review, "from initial filing to final disposition by the highest state court," is tolled from the limitations period under § 2244(d)(2). *See* 186 F.3d at 560-61. However, the court specifically reserved the present question. *See* 186 F.3d at 558 n.1.

> In habeas, if the decision of the last court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition.

501 U.S. at 735; *see also Harris v. Reed*, 489 U.S. 255 (1989) (adopting independent-and-adequate-state-ground rule from *Michigan v. Long*, 463 U.S. 1032 (1983), for federal habeas cases). Although this Court's decision on Respondents' previous objection moots this objection, this Court agrees with the magistrate that whether or not the South Carolina Supreme Court's two-sentence decision rested on an independent and adequate state ground is not clear. Therefore, Respondents' objection is without merit.

3. Waiver

Respondents object to the magistrate's rejection of their argument that Petitioner's voluntary guilty plea waived any challenge to the constitutionality of S.C.

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Code Ann. § 20-7-50. The magistrate, in rejecting Respondents' argument, relied on the *Blackledge/Menna* exception to the general rule that an intelligent, competent, and voluntary guilty plea may not be collaterally attacked. The exception applies "where the defendant's claimed right is the 'the right not to be haled into court at all upon the felony charges.'" *United States v. Drew*, 200 F.3d 871, 876 (D.C. Cir. 2000) (citing, *inter alia*, *Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974); *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975)); *see also United States v. Bluso*, 519 F.2d 473, 474 (4th Cir. 1975). In their objection, Respondents point to no authority that persuades this Court that the magistrate erred in applying the relevant law. Respondents' objection is therefore without merit.

B. Petitioner's Objections

Petitioner objects to the magistrate's conclusions that Petitioner's conviction did not violate due process and that S.C. Code Ann. § 20-7-50 is not unconstitutionally vague as applied to Petitioner. Respondents had argued to the magistrate that Petitioner's conviction satisfied due process because previous case law gave Petitioner adequate notice that § 20-7-50 proscribed her conduct. Petitioner argued that the case law, as well as the statute itself, failed to provide her with constitutionally adequate notice. Petitioner also argued that the statute was impermissibly vague as applied to her. The magistrate found that the state supreme court's interpretation of § 20-7-50 "was fully within due process guarantees based upon existing precedent," and that § 20-7-50 is not unconstitutionally vague.

[page 8 of 9]

Although this Court's resolution of the statute-of-limitations issue eliminates any need to address Petitioner's objections, we do so in the event the Fourth Circuit disagrees with that resolution, and after a de novo review of the record and the relevant case law, this Court agrees with the magistrate's conclusions and finds both of Petitioner's objections without merit. Simply, this Court is not persuaded by Petitioner's analysis of the relevant cases that the magistrate erred in applying the applicable constitutional law.

IV. CONCLUSION

After a de novo review of record, the relevant case law, and the magistrate's Report and Recommendation, this Court finds, based on the reasons stated above, that Petitioner's habeas corpus petition should be dismissed in its entirety as untimely because of Petitioner's failure to file her petition within the limitation period established in 28 U.S.C. § 2244(d). Otherwise, this Court finds that the magistrate's

report is based upon the proper law. Accordingly, this Court modifies the Report and Recommendation by replacing the magistrate's discussion of the statute-of-limitations issue with this Court's discussion of that issue. Otherwise, the Report and Recommendation is accepted and adopted in its entirety.

[page 9 of 9]

IT IS THEREFORE ORDERED that Petitioner's claim be DISMISSED in its entirety as untimely.

IT IS SO ORDERED.

"s/G. Ross Anderson, Jr."
G. ROSS ANDERSON, JR.
UNITED STATES DISTRICT
JUDGE

Anderson, South Carolina

March 22, 2000

ORIGINAL FILED
MAR 27 2000
LARRY W. PROPES, CLERK
FLORENCE, S.C.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Malissa Ann Crawley,

Petitioner,

JUDGMENT IN A CIVIL CASE

vs.

Civil Action No. 4:99cv527-19

William D. Catoe, Director-Designate, Department of Corrections, State of South Carolina; and Attorney General of the State of South Carolina,

Respondents.

Decision by the Court. This action came to hearing before the court. The issues having been duly heard and the court having modified in part and adopted in part the recommendation of the magistrate judge,

IT IS ORDERED AND ADJUDGED that petitioner's claim is dismissed in its entirety as untimely.

March 27, 2000

LARRY W. PROPES, CLERK
UNITED STATES DISTRICT COURT

"s/Sharon Welch"
Deputy Clerk

FILED FEB 18 2000
LARRY W. PROPES, CLERK
FLORENCE, S.C.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRCT OF SOUTH CAROLINA
FLORENCE DIVISION

MALISSA CRAWLEY, #212641,	) Civil Action No.
	) 4:99-52D-13BF
Petitioner,	)
	)
v.	) MAGISTRATE
	) JUDGE'S
	) REPORT AND
	RECOMMENDATION
	)
WILLIAM D. CATOE,	)
DEPARTMENT OF	)
CORRECTIONS, STATE OF	)
SOUTH CAROLINA; CHARLES	)
M. CONDON, ATTORNEY	)
GENERAL OF THE STATE OF	)
SOUTH CAROLINA; AND	)
STEPHEN K. BENJAMIN,	)
SOUTH CAROLINA	)
DEPARTMENT OF PROBATION,	)
PAROLE AND PARDON	)
SERVICES,	)
	)
Respondents.	)

I. BACKGROUND

Petitioner, Malissa Crawley ("petitioner"), is, upon facts and information submitted, presently on parole in Anderson County, South Carolina. Petitioner, represented by counsel, filed her petition for a writ of habeas corpus pursuant to 28

U.S.C. § 2254[1] on May 12, 1999. Respondents filed a motion for summary judgment on May 21, 1999. The court issued an order dated June 8, 1999, granting the petitioner's motion to extend time in which

to file a response to the motion for summary judgment until July 2, 1999. The petitioner filed a memorandum in opposition to the motion for summary judgment on July 2, 1999. The court has carefully reviewed the pleadings, memoranda of law, and exhibits offered by petitioner and respondents in support of their respective positions.

II. Procedural History

The following procedural history of this case is not in dispute. On November 29, 1991, the petitioner was arrested and charged with "unlawful neglect of a child" in violation of S.C. Code Ann. § 20-7-50 (1985). The petitioner waived grand jury presentment and pled guilty as charged on January 6, 1992. The factual basis for the plea was that the petitioner was using illegal drugs while pregnant and, therefore, was guilty of "unlawful neglect of a child." The Honorable Tom J. Ervin sentenced the petitioner to five years imprisonment, suspended during five years probation. The petitioner did not appeal her conviction or sentence. On August 5, 1994, the Honorable Frank Eppes revoked the petitioner's probation and reinstated the active sentence based upon her July 15, 1994, conviction for criminal domestic violence. The petitioner did not appeal her revocation.

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[1] This habeas corpus case was automatically referred to the undersigned United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Rule 19.02(B)(2)(c), DSC. Because this is a dispositive motion, this report and recommendation is entered for review by the Court.

On September 25, 1994, the petitioner filed a state petition for writ of habeas corpus and alleged her confinement was unlawful for the following reason:

> The petitioner believes that she is being held unlawfully due to the fact that the act to which she pled guilty [unlawful neglect of a child] is not a crime in the State of South Carolina. As a result, the trial court did not have jurisdiction to either accept her plea or to revoke her probation. As the charge against her, based upon the act she is alleged to have committed, is not a crime within the state of South Carolina, she is being held in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth

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> Amendment of the Constitution of the United States of America.

(Petition for Writ of Certiorari).

On September 30, 1994, the Honorable H. Dean Hall granted the writ and set a hearing on the merits for October 17, 1994. Judge Eppes, who ultimately heard the case, issued a formal written order vacating the petitioner's conviction and sentence. Judge Eppes held that "The sole question for the court is whether the petitioner pled guilty to a crime that does not exist in South Carolina." He ruled that the petitioner did so. The State appealed Judge Eppes' order granting state habeas relief. The South Carolina Supreme Court allowed the petitioner to hold the time limits for filing her initial brief in abeyance while the appeal in Cornelia Whitner's case was pending. The *Whitner*[2] case was based

[2] The court issued a full opinion in *Whitner* holding that a viable fetus is a "child" within the meaning of child abuse and endangerment statute, and thus a mother could be charged under the statute for ingesting crack

on this same issue. After the state supreme court issued its first decision in *Whitner*, which was ultimately withdrawn upon a grant of rehearing which led to the second *Whitner* opinion described in footnote 2 below, petitioner Crawley filed a brief raising a number of constitutional claims. On reply, the State argued that the federal constitutional claims were procedurally barred because neither the state habeas petition nor Judge Eppes' order addressed these arguments.

After reviewing the record and appellate briefs, the South Carolina Supreme Court reversed the granting of state habeas relief without oral argument and reinstated petitioner

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Crawley's conviction and sentence. The December 1, 1997, order in Crawley states in full:

> The state has filed an appeal following the grant of respondent's petition for a writ of habeas corpus. We reverse the grant of habeas corpus and reinstate respondent's conviction for unlawful neglect of a child. [See] *Whitner v. State*. . .

On January 8, 1998, the state supreme court denied the petition for rehearing. Chief Justice Rehnquist denied the petitioner's request to remain on bond while she sought certiorari review from the United States Supreme Court.

On or about March 24, 1998, the petitioner filed a joint petition for writ of certiorari in the United States Supreme Court seeking review of the South Carolina Supreme Court's decision in her case and *Whitner*. The petition raised the following question:

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cocaine during third trimester of pregnancy, causing the baby to be born with cocaine metabolites in its system. *Whitner v. State*, 492 S.E. 2d 777 (S.C. 1997), rehearing denied, certiorari denied, 118 S.Ct. 1857, 140 L.Ed. 2d 1004 (this decision is referred to as *Whitner II* by the parties to this action in their pleadings)

> Whether the South Carolina Supreme Court's unprecedented and unforeseeable decision reinterpreting the state's criminal child endangerment statute to expand the definition of "child" in "legal custody" to include a viable fetus violates the Fourteenth Amendement's requirement of due process notice and its prohibition against vague criminal statutes?

In a memorandum order dated May 26, 1998, the United States Supreme Court denied the petition. *Cornelia Whitner v. South Carolina,* and *Malissa Crawley v. South Carolina*, __ U.S. __, 118 S. Ct. 1857, (1998).

III. Grounds for Relief

The petitioner filed her writ of habeas corpus in federal court presenting the following single ground for relief:

> Ground one: South Carolina charged Petitioner with child endangerment for allegedly taking drugs while she was pregnant. At the time Petitioner pled guilty, no court of last resort in the nation had permitted prosecutors to punish prenatal conduct through child abuse or child endangerment

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> laws. Petitioner had no notice that the statute applied to prenatal conduct: nothing in the plain language of the statute or in the precedents from South Carolina–or any other state for that matter–so advised her. Instead, the South Carolina Supreme Court in *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997) created a new crime that dramatically extended the reach of the child endangerment statute. The South Carolina Court then, without opinion, applied this expanded

holding when reversing the state court's grant of habeas corpus.

(Petition p. 5).

IV. Summary Judgment Motion

A. Respondents' Motion

On May 21, 1999, the respondents filed a motion for summary judgment. In their supporting memorandum and a Return and Memorandum of Respondents' Motion for Summary Judgment, the respondents contend that they are entitled to summary judgment because of the following:

1. The respondents submit that the entire petition for writ of habeas corpus is barred by the Petitioner's failure to comply with the statute of limitations. Under 28 U.S.C. § 2244(d), the Petitioner had until January 8, 1999 to file a timely petition. The Petitioner failed to timely file this action in accordance with the law.

2. The court should also dismiss the entire petition for writ of habeas corpus because the Petitioner has defaulted her constitutional claims for federal review.

3. Even if the present petition was properly before this court, the petitioner is not entitled to habeas corpus relief.

   A. The Petitioner's voluntary guilty pleas waived any due process challenge or allegation that she

lacked notice of the conduct proscribed by the statute.

B. The Petitioner's conviction satisfies due process requirements because the previous decisions of the state supreme court gave her adequate notice that a viable fetus was protected by the unlawful neglect statute.

C. The application of the statute to other conduct plainly hazardous to the health and safety of a viable fetus does not render it impermissibly vague as applied to petitioner Whitner [or Crawley].

B. Legal Background

The federal court is charged with liberally construing the complaints filed by *pro se* litigants, to allow them to fully develop potentially meritorious cases. *See Cruz v. Beto*, 405 U.S. 319 (1972), and *Haines v. Kerner*, 404 U.S. 519 (1972). The court's function, however, is not to decide issues of fact, but to decide whether there is an issue of fact to be tried. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, *Weller v. Department of Social Services*, 901 F.2d 387 (4th Cir. 1990), nor can the court assume the existence of a genuine issue of material fact where none exists. If none can be shown, the motion should be granted. Fed. R. Civ. P. 56(c).

The movant has the burden of proving that a judgment on the pleadings is appropriate. Once the moving party makes this showing, however, the opposing party must respond to the motion with "specific facts showing that there is a genuine issue for trial."

The opposing party may not rest on the mere assertions contained in the pleadings. Fed. R. Civ. P. 56(e) and *Celotex v. Catrett*, 477 U.S. 317 (1986).

The Federal Rules of Civil Procedure encourage the entry of summary judgment where both parties have had ample opportunity to explore the merits of their cases and examination of the case makes it clear that one party has failed to establish the existence of an essential element in the case, on which that party will bear the burden of proof at trial. *See* Fed. R. Civ. P. 56(c). Where the movant can show a complete failure of proof concerning an essential element of the non-moving party's case, all other facts become immaterial because there can be "no genuine issue of material fact." In this case, the defendants are "entitled to judgment as a matter of law" under Rule 56(c) because the plaintiff has failed to make a sufficient showing on essential elements of her case with respect to which she has the burden of proof. *Celotex*, 477 U.S. at 322-323.

V. Statute of Limitations

The respondents argue in their motion for summary judgment that the entire petition for writ of habeas corpus is barred by the petitioner's failure to comply with the statute of limitations. The focus of this issue is whether or not petitioner Crawley's appeal to the United States Supreme Court from the South Carolina Supreme Court's denial of relief tolls the one (1) year time period she had in which to file her federal habeas petition. Specifically, the respondents argue that Section 2244(d)(1) states that "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the *judgment of a State court*." [emphasis added]. The respondents argue that the one (1) year statute of limitation starts to run when the state supreme court renders a final "judgment"

and that the petition for U.S. Supreme Court Certiorari does not toll the time.

The respondents cite the case of *Mosely v. Freeman*, 997 F.Supp. 733, 735 (M.D.N.C. 1997), to support their position that the United States Supreme Court is not part of a state court, nor is review by it part of a state proceeding. In *Mosely*, a death row inmate sought the appointment of counsel and the judge in that case, Judge Eliason, concluded that the petitioner was not entitled to the appointment of counsel to challenge the conviction until exhaustion of state remedies was completed. Mosely indicated that he intended to seek a writ of certiorari from the United States Supreme Court to review the denial of collateral relief by the state supreme court. The court in the *Mosely* case held that seeking U.S. Supreme Court review did not toll the one year statue of limitations for filing a federal habeas petition. The court ruled, in essence, that the one year time limit for federal filing begins when the state supreme court renders a final decision, not after denial of certiorari by the U.S. Supreme Court. The respondents state that:

> Judge Eliason addressed the issue of "whether actual or potential Supreme Court certiorari review of state post-conviction relief proceeding should be counted as part of the time during which the state post-conviction relief proceeding is pending . . . in determining that the Supreme Court is not part of a state court, nor is review by it part of a state proceeding . . . *Judge Eliason held that the time for seeking certiorari review from the United States Supreme Court is not part of a pending post-conviction relief application.* (Emphasis added).

(Respondents' memorandum p. 6).

The respondents quote from Judge Eliason's decision that ". . . there is no implicit, much less explicit, evidence that Congress intended that federal courts consider United States

Supreme Court Certiorari Review of state post-conviction proceedings to be part of the

[page 9 of 20]

cognizable time period for filing or processing Section 2254 actions." (Respondents' memorandum p. 7). Based on the *Mosely* decision, the respondents contend that the statute of limitations was not tolled while the certiorari petition was pending before the United States Supreme Court, and therefore, the petitioner had one year from the date when the state supreme court denied her petition for rehearing to file her federal habeas petition. The South Carolina Supreme Court denied the petition for rehearing on January 8, 1998. The state supreme court denied petitioner's motion to remain on bond on January 22, 1998, and denied a petition for rehearing from that ruling on February 6, 1998. The respondents argue that only the petitioner's motion for appeal bond filed in the United States Supreme Court was pending before February 27, 1998, and under state law, a motion for bond is not a pending case or controversy. Therefore, the respondents argue that the petitioner's case was not pending in state court after January 8, 1998, and her petition should have been filed on or before January 8, 1999. It was not filed until February 26, 1999. Thus, the respondents assert that the petition is untimely under 28 U.S.C. § 2244(d)(1).

The petitioner argues that her petition was filed in a timely fashion and that her writ of certiorari to the United States Supreme Court did toll the one-year statute of limitations. The petitioner states that "[her] state habeas petition, properly filed on September 25, 1994, was "pending" at all times from the date of its filing through May 26, 1998, when the U.S. Supreme Court denied certiorari. This continuously pending post-conviction action tolled the one-year statue of limitations until May 26, 1998. The statute accordingly provides that she has one year – until May 26, 1999 – to file her habeas petition. As her petition

was filed February 26, 1999, it is timely." (Petitioner's memorandum in opposition p. 4). The

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petitioner primarily bases her argument on the case of *Whitner v. Moore*, C.A. No. 2:98-3564-23AJ (D.S.C. Feb. 24, 1999) (Report and Recommendation). As previously mentioned, Whitner was prosecuted in state court under the same statute as the petitioner. Whitner filed a federal habeas petition. In Whitner's federal habeas petition case, the respondents filed a motion for summary judgment on the sole ground that the petition was time barred by the one year statute of limitations. The matter was referred to U.S. Magistrate Judge Robert S. Carr for preparation of a report and recommendation. The sole issue before the court was whether the one year time limit for filing a federal habeas petition should be tolled under 28 U.S.C. § 2244(d) when a properly filed application for review is pending before the U.S. Supreme Court.. The issue discussed in Magistrate Judge Carr's report and recommendation is the same statute of limitation issue being discussed in this case. Magistrate Judge Carr concluded that Whitner's petition for writ of certiorari pending before the United States Supreme Court tolled the one-year statute of limitations. U.S. District Judge Patrick Michael Duffy adopted Magistrate Judge Carr's report and recommendation and issued an order to that effect. More specifically, the petitioner argues that under *Whitner*, Magistrate Judge Carr and U.S. District Judge Duffy concluded that "tolling the statute of limitations while a petition for a writ of certiorari pends before the U.S. Supreme Court is entirely consistent with the purpose of the tolling provision. It conserves judicial resources by preventing two courts form reviewing the same claims of the same prisoner at the same time." (Petitioner's return in opposition p. 13). The petitioner contends that the respondents misconstrued the *Mosely* decision in that the issue before the court. . .

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> . . . Was not whether the § 2244(d) limitations period should be tolled while the U.S. Supreme Court is considering a petition for certiorari. In fact, the Court was not interpreting the language of § 2244(d)(2) at all. Rather, the court was determining whether the period of actual or potential U.S. Supreme Court certiorari review should be considered when appointing counsel for death-penalty litigants under § 848(q)(4)(B) . . .This exhaustion analysis is unrelated to the statute of limitations and tolling provisions of § 2244(d).

(Petitioner's memorandum in opposition p. 11-12).

The petitioner also argues that when the *Mosely* decision is read in its entirety, there is no direct guidance on the issue currently before this court.

The undersigned concludes that the respondents' argument is not without merit. However, U.S. District Judge Duffy, adopting the report and recommendation of Magistrate Judge Carr, ruled on September 24, 1999, that in *Whitner* (2:98-3564-23AJ), the petitioner's petition in the United States Supreme Court for a Writ of Certiorari was "pending" for purposes of § 2244(d)(2), and thus tolled the section's one-year filing limitation period until that Court denied certiorari. Therefore, based on precedent in this district, the undersigned recommends that the petition not be dismissed as untimely filed.

VI. Procedural Default

The respondents argue that the Court should dismiss the entire petition for writ of habeas corpus because the petitioner has defaulted her constitutional claims for federal review. Specifically, the respondents argue that:

> Since the petitioner did not raise any federal constitutional claims in her state habeas petition, those issues were not properly before the state supreme court . . . the memorandum opinion reinstating the convictions does not expressly state that the state supreme court considered the federal constitutional

[page 12 of 20]

> claims; it simply cites *Whitner* II and section 20-7-50. However, this court should not presume that the state supreme court considered the merits of the federal constitutional issues or declined to apply its procedural bar.

(Respondents' memorandum p. 10).

The petitioner opposes this argument stating that the petitioner fairly presented her constitutional claim to state courts and the fact that the state court did not rule on the merits of a claim is of no consequence, citing *Atkins v. Moore*, 1998 U.S. App. Lexis 3954, at *14 n.6 (4th Cir. Mar. 5, 1998). The petitioner argues that it is highly illogical for the state to suggest that the state habeas court's reliance on state law grounds for granting habeas relief defaulted Ms. Crawley's federal claim. The petitioner cites the case of *Coleman v. Thompson*, 505 U.S. 722 (1991), stating that this case holds that "if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition." *Coleman*, 501U.S. at 735.

The undersigned has reviewed the documents submitted along with the arguments. The South Carolina Supreme Court reversed the granting of habeas relief without oral

argument and reinstated the petitioner's conviction and sentence. The December 1, 1997, order was only two sentences concluding that "we reverse the grant of habeas corpus and reinstate respondent's conviction for unlawful neglect of a child. *Whitner v. State*, Op No. 24468; . . . S.C. Code Ann. § 20-7-50." (Respondents' memorandum p. 3). Therefore, it is not clear whether or not the decision rested solely on state grounds. For that reason, the

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undersigned recommends that the petitioners' claim not be dismissed as procedurally barred.

VII. DISCUSSION

A. Guilty Plea

The respondents contend that the petitioner's voluntarily guilty plea waived any due process challenge or allegation that she lacked notice of the conduct proscribed by the statute. Further, the respondents argue that the petitioner never challenged the voluntariness of her plea in state court and, thereby, waived any claim that she lacked notice that her conduct was prohibited by section 20-7-50. They point to the case of *McCarthy v. United States*, 394 U.S. 459, 466 (1969) quoting "[A] guilty plea is an admission of all the elements of a formal criminal charge." The respondents further argue that "When a criminal defendant has solemnly admitted in open court that he is, in fact, guilty of that offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the plea." *Tollet v. Henderson*, 411 U.S. 258, 267 (1973). The respondents conclude that the petitioner has not preserved any justiciable constitutional claims for federal habeas corpus relief and the petition should, therefore, be dismissed.

The petitioner argues that in decisions subsequent to *Tollett*, the U.S. Supreme Court has made clear that a plea of guilty does not waive a claim that the charge is one which the state may not constitutionally prosecute. *Menna v. New York*, 423 U.S. 61, 62 n.1 (1975). The petitioner further states that her guilty plea did not forfeit her right to raise her due process claim in federal court.

The undersigned has reviewed each parties' argument and their supporting case law.

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The respondents present a persuasive argument that by pleading guilty, the petitioner waived her right to raise independent claims relating to constitutional questions. The respondents cite the *Tollet* case to support their position. However, even though this is a close issue, the United States Supreme Court has recognized one exception to the general rule when the defendant's claimed right is "the right not be haled into court at all upon the felony charges." *United States of America v. Drew*, 2000 WL 35563 (D.C.Cir. 2000), citing *United States v. Broce*, 488 U.S. 563, 574-75 (1989). The Fourth Circuit has held that a guilty plea does not prevent collateral attack on judgment where claim is that the underlying statute is unconstitutional. *United States v. Bluso*, 519 F.2d 473 (4th Cir. 1975). Therefore, the undersigned concludes that the guilty plea of the petitioner did not arguably waive her claim if it goes to the constitutionality of the statute itself. Thus, the undersigned recommends that the petition not be dismissed based on the fact that the petitioner pled guilty and further recommends that the merits be addressed.

B. Conviction Satisfies Due Process: Viable Fetus

The respondents argue that the petitioner's conviction satisfies due process requirements because the previous decisions of the state supreme court gave her adequate notice

that a viable fetus was protected by the unlawful neglect statute. The respondents contend that previous precedents of the state supreme court gave the petitioner ample notice that a viable fetus was a "person" and therefore a "child" under the unlawful neglect statute so that, although section 20-7-50 did not proscribe fetal abuse specifically, the application of the statute to this set of facts did not violate due process. The respondents assert that "since petitioner has not shown that the decision reinstating her conviction 'was contrary to,

[page 15 of 20]

or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. . . ,' this court should deny habeas corpus relief, 28 U.S.C. § 2254(d)(1)." (Respondents' memorandum p. 22-23).

The petitioner argues that the cases upon which the state relies in their memorandum to support summary judgment as well as the statute itself failed to provide her with constitutionally adequate notice. (Petitioner's memorandum in opposition p. 24). The petitioner contends that :

> The state insists that Ms. Crawley should have known that the child endangerment law criminalized her behavior, but ignores the fact that at the time of Ms. Crawley's conviction, no circuit court in South Carolina had interpreted the *Hall*, *Fowler*, and *Horne* cases (Cases cited by the respondents to support their position) to extend the reach of the child endangerment law. See *Crawley v. Evatt*, no. 94-CP-04-1280 (S.C. Ct. Gen. Sess. Oct. 17, 1994). Surely, Ms. Crawley cannot fairly be held to a deeper understanding of the law than all the circuit courts that had examined this issue at the time of her conviction.

(Petitioner's memorandum in opposition p. 23-25).

The petitioner asserts that she could not have foreseen that the reference of a "child" in the unlawful neglect statute included an unborn, viable fetus. Specifically, she contends that she had no notice that the statute prohibited her ingestion of cocaine while pregnant.

At the time of petitioner's crime, S.C. Code Ann. § 20-7-30(1) (1985) defined child as "a person under the age of eighteen." The United States Supreme Court has held that the unforeseeable enlargement of a criminal statute deprives a defendant of due process of law where she has no notice that her conduct was criminal. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). The question that should be addressed is whether or not the statute, either

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standing alone or as construed, makes it reasonably clear at the relevant time that the defendant's conduct was criminal. *United States v. Lanier*, 520 U.S. 259, 267 (1997). Prior precedents of the state courts explaining the meaning of a statute are appropriate in determining whether the defendant had notice that her conduct was prohibited. *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973). The respondents argue that in determining whether the petitioner had adequate notice that section 20-7-50 applied to her conduct, this court should consider the case law relied upon by the state supreme court citing the case of *Whitner*, 492 S.E.2d at 779-80.

The respondents discuss several cases to support their position. The respondents point to *Hall V. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960) asserting that it was the first case in which the state supreme court held that a viable fetus was a "person" under state law. In the *Hall* case, the defendant was the driver of a car which collided with a bus, causing his passenger to give birth prematurely. The child died four hours later. The court concluded that "we have no difficulty in concluding that a fetus having reached that period of

prenatal maturity where it is capable of independent life apart from its mother is a person and if such a child is injured, it may after birth maintain an action for such injuries . . . the law recognizes the separate existence of an unborn child for the purpose of protecting his property rights and to protect him against criminal conduct." *Hall*, 113 S.E. 2d at 793.

In the case of *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42(1964), an automobile accident killed a woman who was eight months pregnant. When the plaintiff filed suit on behalf of the estate of the deceased infant, the defendant moved to dismiss because there was not an allegation that the infant was born alive. The state supreme court

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disagreed and concluded that the plain language of the wrongful death statute allowed an action on behalf of the estate of a viable fetus. The state supreme court stated in their decision that " a viable child is a person before separation from the body of its mother."

In *State v. Horne*, 282 S.C. 444, 319 S.E. 2d 703 (1984), the state supreme court concluded that a viable fetus was protected by the criminal law of this state. In that case, the defendant stabbed his pregnant wife in the abdomen and during an emergency caesarean section operation, the unborn child died in the womb. The defendant was charged with murder, and the jury convicted him of manslaughter. On appeal, the state supreme court held that the language of the murder statute allowed a prosecution for the unlawful killing of a viable fetus. The state court noted that "It would be grossly inconsistent for us to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context." *Horne*, 282 S.C. at 477, 319 S.E.2d at 704.

As previously noted, the state supreme court in Cornelia Whitner held that she had notice that her unborn, viable fetus

was a "child" protected by section 20-7-50. As the respondents correctly argue, the state supreme court in *Whitner*, noted that state law defines "child" as "a person under the age of eighteen." Therefore, although the statute 20-7-50 did not state that a child included a viable fetus, the meaning of "person" brings a viable fetus under its definition.

The petitioner also argues that she could not have known section 20-7-50 applied to her criminal conduct because other states prohibited prosecutions for prenatal abuse of a fetus. However, even if the South Carolina Supreme Court has reached a different conclusion

than other states, the correctness of the state supreme court's interpretation of the statute may not be reviewed in this Court. According to relevant case law, this Court is bound to accept the interpretation of South Carolina law by the highest court of the state. *See Hortonville Joint School Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976).

The undersigned finds that the state supreme court's interpretation of the statute was fully within due process guarantees based upon existing precedent. Therefore, although section 20-7-50 did not specifically state "fetal abuse" in its wording, the application of the statute to the petitioner's case did not violate due process. Thus, since the petitioner has failed to show that the decision reinstating her conviction was "contrary to, or involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . ." 28 U.S.C. § 2254(d)(1), the undersigned recommends that the respondents' motion for summary judgment be granted on this issue and habeas corpus relief denied.

C. Vagueness

The petitioner argues that the application of the statute is impermissibly vague because it gives the State unbridled discretion in determining which conduct to prosecute. The petitioner states in her memorandum in opposition to the respondent's position that:

> While it is true that the unpredictable and unlimited breadth of the newly construed child endangerment statute will confound pregnant women and prosecutors in the future, the claim in this case is based on the fact that the statute did not inform Ms. Crawley *herself* of the range of prohibited behavior, or whether her conduct fell within the scope of the statute. The Due Process clause requires more, and the State has not demonstrated that the child endangerment statute gave Ms. Crawley the fair warning required by the Constitution.

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(Petitioner's memorandum p. 25).

The respondents argue that the application of the statute to other conduct plainly hazardous to the health and safety of a viable fetus does not render it impermissibly vague. Specifically, the respondents assert that the petitioner is asking this Court to review a hypothetical application of the statute, when the petitioner's case comes squarely within its parameters. In addition, they assert that "this Court should not grant habeas corpus relief on the basis of potential prosecutions that may never occur." (Repondents memorandum p. 24-26)

The undersigned has reviewed each parties' argument and all evidence presented. The court in *United States v. Mazurie*, 419 U.S. 544, 550 (1975), held that "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." In this case, the

petitioner pled guilty to the crime charged. The voluntariness of the guilty plea is not an issue before this Court. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. *Parker v. Levy*, 417 U.S. 733, 756 (1974).

Regarding this issue, the petitioner argues that the child endangerment statute "did not inform Ms. Crawley *herself* of the range of prohibited behavior, or whether her conduct fell within the scope of the statute." The undersigned disagrees.

A review of the statute and its language make it clear that it is a crime to unlawfully "neglect" or "endanger" a child. The South Carolina Supreme Court held that a viable fetus is a "child" within the statute and entitled to protection. Previous cases cited in section VII B of this report and recommendation also have reached this same conclusion.

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The statute provides sufficient notice to the petitioner that her conduct was prohibited behavior. The undersigned concludes it is not unconstitutionally vague. Thus, the undersigned recommends that the respondents' motion for summary judgment be granted on this issue.

VIII. Conclusion

In summary, the undersigned recommends that the petitioner's claim not be summarily dismissed as untimely filed or procedurally barred. However, the undersigned recommends that summary judgment be granted as the undersigned concludes that the petitioner's conviction did not violate due process nor was the relevant state statute unconstitutionally vague. For these reasons, it is recommended that respondents' motion for summary judgment be granted, and the petition be dismissed without an evidentiary hearing.

Respectfully Submitted,

"s/Terry L. Wooten"
Terry L. Wooten
United States Magistrate Judge

February 18th, 2000
Florence, South Carolina

In the Supreme Court
of the United States

MEMORANDUM DECISION
Cite as 118 S. Ct. (1998)

Cornelia WHITNER, petitioner, v. SOUTH CAROLINA; and Melissa Ann CRAWLEY, petitioner, v. SOUTH CAROLINA.

No. 97-1562.

May 26, 1998.

Case below, 328 S.C. 1, 492 S.E.2d 777.

Motion of National Association of Alcoholism & Drug Abuse Counselors, et al., for leave to file a brief as *amici curiae* granted. Petition for a writ of certiorari to the Supreme Court of South Carolina denied.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Malissa Ann Crawley, Respondent,

v.

Parker Evatt,
Commissioner of the
South Carolina
Department of
Corrections, Appellant.

Appeal From Anderson County
Frank Eppes, Judge

Memorandum Opinion No. 97-MO-117
Submitted December 18, 1996 – Filed December 1, 1997

REVERSED

Attorney General Charles Molony Condon, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Teresa Knox, and Assistant Attorney General G. Robert Deloach, III, all of Columbia, for appellant.

C. Rauch Wise, of Greenwood, and Lynn M. Paltrow, of New York, New York, for respondent.

PER CURIAM: The State has filed an appeal following the grant of respondent's petition for a writ of habeas corpus. We reverse the grant of habeas corpus and reinstate

respondent's conviction for unlawful neglect of a child. *Whitner v. State*, Op. No. 24468 (S.C. Sup. Ct. refiled

[page 2 of 2]

October 27, 1997) (Davis Adv. Sh. No. 30 at 27); S.C. Code Ann. § 20-7-50 (Supp. 1995).

REVERSED.

"s/Jean H. Toal" A.J.
"s/John H. Waller, Jr." A.J.
"s/E.C. Burnett, III" A.J.

We adhere to our dissenting opinions in *Whitner v. State*, Op. No. 24468 (S.C. Sup. Ct. Refiled October 27, 1997) (Davis Adv. Sh. No. 30 at 27) and would affirm.

"s/Ernest A. Finney, Jr." C.J.
"s/James E. Moore" A.J.

FILED-CLERKS OFFICE
ANDERSON, SC
OCT 17 12:34 P.M. '94
COMMON PLEAS AND
GENERAL SESSIONS

ENTERED
11-1-94

STATE OF SOUTH CAROLINA	)
	) IN THE COURT OF
COUNTY OF ANDERSON	) COMMON PLEAS
Malissa Ann Crawley,	)
	)
Petitioner,	) ORDER
	)
-vs-	) 94-CP-04-1280
	)
Parker Evatt, Commissioner of the South Carolina Department of Corrections,	)
	)
Respondent.	)

The petitioner, Malissa Ann Crawley, filed her Habeas Corpus Petition alleging that she plead guilty to a crime that does not exist in South Carolina. She contends she is being held unlawfully in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America. She plead to a violation of S. C. Code § 20-7-50, the child abuse or neglect statute.[1]

[1] The statute provides: "Any person having legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such child or helpless person, so that the life, health, or comfort of such child or helpless person is endangered or is likely to be endangered, shall be

Prior to the hearing the parties stipulated to certain facts and introduced exhibits. On January 6, 1992 the petitioner pled to a child of child neglect arising out her giving birth to a

[page 2 of 3]

child who tested positive for cocaine. On August 5, 1994 the court revoked her probation and sentenced her to five years imprisonment after she was charged with violating her probation. She is presently being held on that charge. The respondent does not contest the authority of the court to grant relief under the South Carolina habeas corpus statute. The sole question for the court is whether the petitioner pled guilty to a crime that does not exist in South Carolina. If she has, the use of the habeas corpus statute is certainly appropriate. *Butler v. State*, 302 S.C. 466, 397 S.E.2d 87 (1990).

The issue involved in this case is identical to several other cases that have arisen in this state. At present the South Carolina Supreme Court has agreed to hear one case that will resolve this case and all other pending cases. The court has reviewed the briefs filed on behalf of both parties filed with the South Carolina Supreme Court. As this case will be controlled by that decision, and all other circuit court that have addresed the issue have resolved the issue in favor of the petitioner, this court feels that it must also grant the relief requested.

The Court by its order does not condone the actions of the petitioner in taking drugs while pregnant. The conditions imposed by the court in her appeal bond order hopefully will help the petitioner in her drug abuse problem. The court also recognizes the fact that the state cannot give back to the

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guilty of a misdemeanor and shall be punished within the discretion of the court.

petitioner any time she may serve while the issue makes its way through the courts. The petitioner can, however, always give the

[page 3 of 3]

time back to the state in the event this case is reversed.

WHEREFORE, it is hereby order adjudged and decreed that the guilt plea and conviction of the petitioner is hereby set aside. The indictment for a violation of S.C. Code § 20-7-60 is hereby dismissed.

10/17/, 1994

"s/Frank Eppes"
FRANK EPPES
Presiding Judge
Anderson County

[South Carolina Supreme Court Seal]

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

January 8, 1998

C. Rauch Wise, Esquire
Wise & Tunstall
305 Main St,
Greenwood, SC 29646

Re: Crawley, Malissa v. Parker Evatt, et al.

Dear Mr. Wise:

The Court has refused your Petition for Rehearing in the above case in the following Order:

"Petition for Rehearing is denied.

s/ Jean H. Toal A.J.

s/ John H. Waller, Jr. A.J.

s/ E.C. Burnett, III A.J.

I would grant Rehearing.

s/ Ernest A. Finney, Jr. C.J.

s/ James E. Moore A.J.

January 8, 1998."

The remittitur in this matter is today being forwarded to the Clerk of Court for Anderson County.

Very truly yours,

"s/Clyde N. Davis, Jr."

CLERK

CND, Jr./djp

ORIGINAL FILED
FEB 26 1999
LARRY W. PROPES, CLERK
COLUMBIA, SC

0 99-0527 13BD

APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

Name **Malissa Ann Crawley**
Prison number **SCDC 212641**
Place of confinement **On parole from State Park Correctional Center, State Park, SC**
United States District Court for the District of **South Carolina (Columbia Division)**
Case No. _____
(To be supplied by Clerk of U. S. District Court)
Malissa Ann Crawley, PETITIONER
(Full name)
v.
William D. Catoe, RESPONDENT
(Director-Designate, Department of Corrections, State of South Carolina)
and
THE ATTORNEY GENERAL OF THE STATE OF **South Carolina**, and Stephen K. Benjamin, Director-Designate, **South Carolina Department of Probation, Parole & Pardon Services** ADDITIONAL RESPONDENTS.

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Instructions: Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any

false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $__, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is:
United States District Court for the District of South Carolina (Columbia Division)
1845 Assembly Street
Columbia, SC 29201

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack **Supreme Court of the State of South Carolina.**

2. Date of judgment of conviction:
date of guilty plea: January 6, 1992
date of probation revocation: August 5, 1994
date writ of habeas corpus was granted by state court (guilty plea was set aside and indictment dismissed): Oct. 17, 1994
date state court grant of writ of habeas corpus was reversed by S.C. Supreme Court: December 1, 1997

3. Length of sentence **After pleading guilty to child endangerment pursuant to § 20-7-50, Petitioner was placed on probation. She then pled guilty to Criminal Domestic Violence on July 15, 1994. On August 5, 1994 she was found to be in violation of the conditions of her probation and ordered to begin serving her previously suspended sentence.**

4. Nature of offense involved (all counts)
Pled guilty to one count of endangering a child pursuant to S.C. Code § 20-7-50 when her newborn tested positive for cocaine.

5. What was your plea? (Check one)
(a) Not guilty ___
(b) Guilty **X** _
(c) Nolo contendere ___
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
_____

6. Kind of trial: (Check one)
(a) Jury ___
(b) Judge only ___
No trial, pled guilty.

[Page 3 of 7]

7. Did you testify at the trial?
Yes **X** No ___
Testified at guilty plea colloquy.

8. Did you appeal from the judgment of conviction?
Yes ___ No **X**

9. If you did appeal, answer the following:
(a) Name of court_____
(b) Result _____
(c) Date of result _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes **X** No ___

11. If your answer to 10 was "yes," give the following information:
(a)(1) Name of court **South Carolina Court of Common Pleas, County of Anderson**

(2) Nature of proceeding **Petition for Writ of Habeas Corpus**

(3) Grounds raised

Denial of due process and right to privacy under the Fourteenth Amendment; discrimination on the basis of sex in violation of the Fourteenth Amendment

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes **X** No ____

(5) Result **habeas petition granted, conviction set aside and indictment dismissed**

(6) Date of result **October 17, 1994**

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ___ No ___

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result _____

[Page 4 of 7]

(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ___ No ___
(2) Second petition, etc. Yes ___ No ___
(3) Third petition, etc. Yes ___ No ___

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

The State of South Carolina appealed the state court's decision granting habeas relief. The South Carolina Supreme Court reversed the decision of the state habeas court. Petitioner filed a petition for writ of certiorari with the U.S. Supreme Court which was denied on May 28, 1998.

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully. Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The

petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

[Page 5 of 7]

A. Ground one: **Denial of due process**

Supporting FACTS (tell your story briefly without citing cases or law):

South Carolina charged Petitioner with child endangerment for allegedly taking drugs while she was pregnant. At the time Petitioner pled guilty, no court of last resort in the nation had permitted prosecutors to punish prenatal conduct through child abuse or child endangerment laws. Petitioner had no notice that the statute applied to prenatal conduct: nothing in the plain language of the statute or in the precedents from South Carolina -- or any other state for that matter -- so advised her. Instead, the South Carolina Supreme Court in Whitner v. State, 492 S.E.2d 777 (S.C. 1997) created a new crime that dramatically extended the reach of the child endangerment statute. The South Carolina Supreme Court then, without opinion, applied this expanded holding when reversing the state court's grant of habeas corpus.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ___ No **X**

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing:

There was no preliminary hearing.

(b) At arraignment and plea:

Robert Gamble
Office of the Public Defender
301 Camson Road
Anderson, SC 29625

(c) At trial:

There was no trial.

(d) At sentencing **(was sentenced at time of plea):**

Robert Gamble
Office of the Public Defender
301 Camson Road
Anderson, SC 29625

(e) On appeal

There was no direct appeal.

(f) In any post-conviction proceeding

Writ of habeas corpus in South Carolina court:
C. Rauch Wise

[Page 6 of 7]

American Civil Liberties Union
of South Carolina Foundation, Inc.
305 Main Street
Greenwood, SC 29646

Defense of State's appeal from habeas court's decision:

Lynn M. Paltrow
45 W. 10th Street, Apt. 3F
New York, NY 10011

C. Rauch Wise
American Civil Liberties Union of South Carolina Foundation, Inc.
305 Main Street
Greenwood, SC 29646

(g) On appeal from any adverse ruling in a post-conviction proceeding:

The following attorneys represented Petitioner in her petition for writ of certiorari:

Lynn M. Paltrow
Barbara J. Olshansky
Laura Davis

C. Rauch Wise
American Civil Liberties Union of South

Kimani Paul-Emile
Center for Constitutional Rights
666 Broadway, 7th floor
New York, NY 10012

Carolina Foundation, Inc.
305 Main Street
Greenwood, SC 29646

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ___ No _X_

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ___ No X
(a) If so, give name and location of court which imposed sentence to be served in the future:_____
(b) And give date and length of sentence to be served in the future: _____
(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ___ No ___

[Page 7 of 7]

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

"s/C. Rauch Wise"
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on February 25, 1999 (date).

"s/Malissa Crawley"
Signature of Petitioner

FILED CLERK'S OFFICE
OCT 9 [illegible]
COMMON PLEAS AND
GENERAL SESSIONS

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF
COUNTY OF ANDERSON	)	COMMON PLEAS
Malissa Ann Crawley,	)	
	)	
Petitioner,	)	
	)	Petition for
-vs-	)	
	)	Writ of Habeas
	)	Corpus
Parker Evatt, Commissioner,	)	
South Carolina Department	)	94-CP-04-1280
of Corrections,	)	
	)	
Respondent.	)	

The petitioner, Malissa Ann Crawley, alleges and would show to the Court as follows;

1. The petitioner is presently incarcerated with the Leath Correctional Institution of the South Carolina Department of Corrections.

2. The respondent is the Commissioner for the South Carolina Department of Corrections as the petitioner is presently being held within the South Carolina Department of Corrections.

3. On January 6, 1992 the petitioner plead guilty to a charge of Unlawful Neglect of a Child. The facts giving rise to the charge are that the petitioner allegedly took cocaine or

crack cocaine while she was pregnant. At the time of her plea the trial judge placed her on probation.

4. On August 5, 1994 the petitioner had her probation revoked and the trial

[page 2 of 2]

judge sentenced her to five years imprisonment.

5. The petitioner believes that she is being held unlawfully due to the fact that the act to which she plead guilty is not a crime in the state of South Carolina. As a result, the trial court did not have jurisdiction to either accept her plea or to revoke her probation. As the charge against her, based upon the act she is alleged to have committed, is not a crime within the State of South Carolina, she is being held in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America.

6. The petitioner requests that this court issue its Writ of Habeas Corpus requiring the defendant to produce the petitioner before the court and to show why the petitioner should not be released from confinement.

WHEREFORE, the petitioner prays that this court issue its Writ of Habeas Corpus requiring the respondent to produce the petitioner before the court and show why the petitioner should not be released from confinement and for such other and further relief as the court may deem just and proper.

September 25, 1994

"s/C. Rauch Wise"
C. RAUCH WISE
Wise & Tunstall
408 Main Street
Greenwood, SC 29646

(803) 299-5010
S.C. Bar No. 006188

Attorney for Petitioner

FILED CLERKS OFFICE
ANDERSON
AUG 6 11:39AM '94
COMMON PLEAS AND
GENERAL SESSION

ORDER

State of South Carolina
County of Anderson

IN THE COURT OF GENERAL SESSIONS
No. 92 – GS – 04 – 01

STATE

-VS-

Malissa A. Crawley
DEFENDANT
00363124-01

Unlawful Neglect of Child
Name of Offense
11-06-61
SCDC# or DOB

Whereas the above named defendant has been charged with violating the conditions of probation ordered on 1-6, 1992 in the court of General Sessions of Anderson County as set forth in the warrant or citation filed herein.

After hearing the evidence and being duly advised, I find the defendant has violated one or more of the conditions of supervision as set forth in the affidavit filed herein and dated 7-22, 1994 a copy of which is incorporated by reference.

IT IS ORDERED that the suspended sentence be revoked and the above named defendant be required to serve 5 ~~months~~/years of the 5 ~~months~~/years sentence identified above, and/or pay $_____; the defendant is not to be reinstated on probation. This action is taken in the (presence/~~absence~~) of the defendant.

IT IS ORDERED that the suspended sentence be revoked and the above named defendant be required to serve

_____ months/years of the original _____ months/years sentence (and/or) pay $_____; thereupon to be reinstated on probation as provided in the sentence identified above and subject to the conditions set forth therein and not inconsistent with this order. This action is taken in the (presence/absence) of the defendant.

IT IS ORDERED that the suspended sentence be revoked and the above named defendant be required to serve _____ months/years (and/or) pay $_____; the defendant is not to be reinstated on probation. This action is taken in the (presence/absence) of the defendant.

The defendant has previously served 0 months/years on this sentence.

IT IS ORDERED that the above named defendant is continued on probation as provided for in the sentence identified above and subject to the conditions set forth therein and not inconsistent with this order. This action is taken in the (presence/absence) of the defendant.

Additional Conditions ordered by the Court:

5 day of August, 1994

Anderson, SC

"s/Frank Eppes"
Presiding Judge
10th Circuit

You are hereby advised that under the law the Court may at any time revoke or modify any condition of this probation; impose any lawful special conditions it deems proper; or it may extend your period of probation not to exceed five (5) years. At any time within the period of your probation, the

Court may, if it sees fit, impose any judgment and sentence it might have [illegible] in the first instance.

This is to certify that I have read or have had read to me the Order and the conditions set out therein. I agree to comply with such conditions and the conditions of my probation order identified above during the period of my probation. I have received a copy of this court order and my sentence identified above.

Witnessed by: "s/Ralph S. Scott" Signed:_____
Probationer

this 5 day of August, 1994, at Anderson, S.C.

Recommended SENTENCE

STATE OF SOUTH CAROLINA

CASE NO. 92-GS-04-01

ANDERSON COUNTY

The defendant Malissa Ann Crawley is committed to the State Department of Corrections/County for a term of 5 (Five) ~~months~~/years and/or to pay a fine of $_____; provided upon the service of _____ months/years and/or payment of $_____, plus ~~pay~~/waive costs and assessments as applicable*, the balance suspended with probation for 5 (Five) ~~months~~/years.

Restitution For physical injury $_____

Yes/No property damage $_____

to be paid _____

_____

to clerk for _____.**

Other conditions any counseling as recommended for substance abuse; and comply with any Family Court Orders; random drug testing; supervision fees exempt due to financial hardship.
Also ADAC fees exempt.

Date January 6, 1992

"s/ Tom J. Ervin"
Presiding Judge

*Costs and Assessments
Non-waivable $_____
Not waived $_____
Total $_____

NEGOTIATED PLEA

_____
Court Reporter

"s/Linda G. DeShields"
Clerk of Court

**Pay to Victim's Compensation Fund if subrogated.

[page 2 of 3]

Form 2 (11/90)

STATE OF SOUTH CAROLINA

COURT General Sessions

COUNTY OF Anderson

January 6, 1992
Term

STATE

-VS-

PROBATION ORDER

Malissa Ann Crawley
Defendant

No. 92 -GS- 04 – 01

OFFENSE Unlawful Neglect of Child

The sentence of the Court is that the defendant, Malissa Ann Crawley, shall [illegible] in the custody of the Board of Corrections of the State of South Carolina for a term of five (5) years ~~(and/or) pay a fine of $_____~~; provided that upon the ~~service of _____ (and/or)~~ payment of $10.00cc that the balance of the aforesaid sentence be and the same is hereby suspended and that the said defendant is hereby placed on probation for a period of five years under the supervision of the South Carolina Probation, Parole, and Pardon Services Board and its agents, subject to the provisions of the laws of this State and the rules and orders of the Board and its agents, with leave that the suspended sentence may be revoked at any time during the period of probation.

THAT AS CONDITIONS OF PROBATION THE AFORESAID SHALL:

Report in person within 48 hours after arrival at his destination to the Supervising Agent.
Restrict his activity to those programs approved by his Supervising Agent.
Refrain from changing his residence or employment without first procuring the consent of his Supervising Agent.
Make a complete and truthful report to his Supervising Agent each month and whenever instructed to by his Supervising Agent until his final release.
Not use controlled substances, except when properly prescribed by a licensed physician.
Not consume alcoholic beverages to excess or visit establishments whose primary business is the dispensation and consumption of alcoholic beverages.
Avoid injurious habits and shall associate only with law-abiding persons.
In all respects, conduct himself honorably, work diligently at a lawful occupation, and support his dependents, if any, to the best of his ability.
Refrain from the violation of any Federal, State, or Local penal law, and shall contact his supervising agent immediately if arrested or questioned by a law enforcement official.
Not leave the State without authorization and shall waive all extradition rights and process and agree to return to South Carolina when directed to by the Court or pursuant to a warrant.
Not possess or purchase a weapon.
Promptly and truthfully answer all inquiries from the Court or Supervising Agent and allow the Agent to visit at any time in his home, at his employment site or elsewhere, and carry out all instructions given by the Agent.
Comply with all provisions of this order including the payment of fines, restitution or other payments and the service of any period of incarceration.

Immediately notify his supervising agent in case of unemployment and/or absenteeism from work and in case of illness or injury.
Submit to a urinalysis test and/or a blood test when requested by his Supervising Agent and agree that the test results may be used as evidence that he did or did not violate these conditions.

ORDER CONTINUED ON REVERSE SIDE

[page 3 of 3]

ORDER CONTINUED FROM REVERSE SIDE

92 – GS - 04 – 01

Pay a supervision fee to the South Carolina Department of Probation, Parole, and Pardon Services of $10 per week while under intensive supervision and $240 per year while under any other level of supervision during conditional release.

Additional Conditions ordered by the Court:

To comply with Family Court orders; any counseling as recommended for substance abuse; random drug testing; supervision fee exempt due to financial hardship; also, ADAC fees exempt.

IT IS FURTHER ORDERED: that the Sheriff or other law enforcement officer who has the custody of the defendant is hereby ordered to deliver said defendant to the Probation Office of this District, or if defendant is under bond, then such bond shall remain in full force until said defendant reports to the Probation Office. The conditions of probation begin (today/~~after service of required portion of suspended sentence~~). It is further ordered that the Clerk of Court [illegible] this order in his office and that he forthwith

forward certified copy to Probation Office of the South Carolina Probation, Parole, and Pardon Services Board.

this 6th day of January 1992,

"s/ Tom J. Ervin"
Presiding Judge
Honorable Tom J. Ervin
Tenth Judicial Circuit

Anderson, S.C.

You are hereby advised that under the law the Court may at any time revoked or modify any condition of this probation; impose any special conditions it deems proper; or it may extend your period of probation not to exceed five (5) years.

You shall be subject to arrest, upon order of the Court, or without order of the Court, by the Probation Agent. At any time within the period of your probation, the Court may, if it sees fit, impose the judgement and sentence it might have imposed in the first instance.

This is to certify that I have read or have had read to me the Order of Probation and the conditions set out therein. I agree to comply with such conditions during the period of my probation. I have received a copy of this court order.

Witnessed by: Ralph S. Scott

Signed: "s/M. Crawley"
Probationer

Signed this 6th day of January, 1992, at Anderosn, SC.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF
COUNTY OF ANDERSON) GENERAL SESSIONS
92-GS-04-01

THE STATE,

VS.

MALISSA ANN CRAWLEY,

DEFENDANT.

GUILTY PLEA BEFORE THE HONORABLE TOM J. ERVIN, ESQUIRE, PRESIDING CIRCUIT COURT JUDGE, AT THE ANDERSON COUNTY COURTHOUSE, ANDERSON, SOUTH CAROLINA, ON JANUARY 6, 1992.

APPEARANCES:

DRUANNE WHITE, ESQUIRE
ASSISTANT SOLICITOR

ROBERT GAMBLE, ESQUIRE
ATTORNEY FOR THE DEFENDANT

SUSAN AHEARN-HAWKINS, CVR
CIRCUIT COURT REPORTER

[page 2 of 7]

THE COURT: MS. CRAWLEY, WOULD YOU RAISE YOUR RIGHT HAND, PLEASE.

(MALISSA ANN CRAWLEY, IS FIRST DULY SWORN.)

THE COURT: MALISSA ANN CRAWLEY IS CHARGED IN THE

INDICTMENT WITH UNLAWFUL NEGLECT OF A CHILD.

MRS. WHITE, HAVE THERE BEEN ANY NEGOTIATIONS IN THIS CASE?

MRS. WHITE: YES SIR, YOUR HONOR.

THE COURT: GO AHEAD AND STATE THEM.

MRS. WHITE: WE HAVE A RECOMMENDED SENTENCE OF FIVE YEARS SUSPENDED ON FIVE YEARS PROBATION WITH COMPLIANCE WITH ANY FAMILY COURT TREATMENT PLANS, RANDOM DRUG TESTING, AND GO TO ADAC OR SOME OTHER FACILITY SUCH AS THAT TO GET HELP WITH DRUGS.

THE COURT: MR. GAMBLE, YOU REPRESENT MS. CRAWLEY?

MR. GAMBLE: I DO, YOUR HONOR.

THE COURT: AND YOU'VE EXPLAINED THAT RECOMMENDATION TO HER?

MR. GAMBLE: YES SIR. I'VE GONE OVER THAT WITH HER.

THE COURT: HOW DOES SHE INDICATE SHE WISHES TO PLEAD?

MR. GAMBLE: GUILTY, YOUR HONOR.

THE COURT: AND YOU'VE EXPLAINED TO HER THAT IF

[PAGE 3 OF 7]

SHE DOES PLEAD GUILTY SHE GIVES UP HER RIGHTS, INCLUDING HER RIGHT TO A JURY TRIAL?

MR. GAMBLE: YES SIR.

THE COURT: DO YOU BELIEVE SHE UNDERSTANDS ALL HER RIGHTS AND THE PENALTIES SHE COULD RECEIVE?

MR. GAMBLE: I DO, YOUR HONOR.

THE COURT: DO YOU AGREE WITH HER DECISION TO PLEAD GUILTY?

MR. GAMBLE: YES SIR, I DO.

EXAMINATION OF MALISSA ANN CRAWLEY

BY THE COURT:

Q MS. CRAWLEY, HOW OLD ARE YOU?
A THIRTY (30).
Q HOW FAR DID YOU GO IN SCHOOL?
A 12TH GRADE.
Q ARE YOU UNDER THE INFLUENCE OF ANY ALCOHOL OR DRUGS TODAY?
A NO SIR.
Q ARE YOU SATISFIED WITH THE WAY IN WHICH YOUR ATTORNEY, MR. GAMBLE, HAS REPRESENTED YOU IN THIS MATTER?
A YES SIR.
Q DO YOU WANT A JURY TRIAL?
A NO SIR.
Q YOU'RE PLEADING GUILTY BECAUSE YOU ARE GUILTY?
A YES SIR.

[PAGE 4 OF 7]

Q NO ONE'S THREATENED YOU TO PLEAD GUILTY?
A NO SIR.
Q DO YOU UNDERSTAND IF YOU VIOLATE PROBATION YOU COULD SERVE UP TO FIVE YEARS?
A YES SIR.

MRS. WHITE: JUDGE, THIS HAS NOT BEEN TO THE GRAND JURY.

Q ARE YOU WISHING TO WAIVE YOUR RIGHT TO HAVE THIS SENT TO THE GRAND JURY?

A YES SIR.

Q AT THAT TIME THE GRAND JURY COULD NO BILL THE CASE WHICH COULD END THE MATTER, BUT YOU GIVE UP THAT RIGHT IF YOU WAIVE OR GIVE UP PRESENTMENT. DID YOU UNDERSTAND THAT?

A YES SIR.

Q DO YOU UNDESTAND THAT THE STATE WOULD HAVE THE BURDEN OF PROVING YOUR GUILT AT TRIAL BEYOND A REASONABLE DOUBT, THAT YOU COULD TESTIFY IN YOUR OWN BEHALF, THAT YOU COULD SUBPOENA WITNESSES IN YOUR OWN DEFENSE, CONFRONT AND CROSS EXAMINE THE WITNESSES AGAINST YOU - - YOU DON'T EVEN HAVE TO TESTIFY? DO YOU UNDERSTAND ALL THAT?

A YES SIR.

Q YOU STILL WANT TO PLEAD GUILTY?

A YES SIR.

[PAGE 5 OF 7]

THE COURT: I FIND YOUR DECISION TO PLEAD GUILTY AND WAIVE PRESENTMENT IS FREELY, VOLUNTARILY AND INTELLIGENTLY MADE, ALL UPON THE

ADVICE AND COUNSEL OF
A COMPETENT ATTORNEY WITH WHOM YOU'RE SATISFIED AND
YOUR PLEA IS ACCEPTED. THE RECOMMENDATIONS ARE ALSO
ACCEPTED.
MR. GAMBLE, IS FAMILY COURT CURRENTLY SUPERVISING
THIS MATTER?
MR. GAMBLE: FAMILY COURT IS INVOLVED IN THE
MATTER, YOUR HONOR, SO I'M NOT SURE WHAT'S --
MS. CRAWLEY: THE 9TH.
MR. GAMBLE: HUH?
MS. CRAWLEY: IT'LL BE ON THE 9TH.
MR. GAMBLE: THE HEARING'S COMING UP THE 9TH AND
IT'LL -- I CAN PREDICT THAT IT'LL GO THE USUAL WAY
THESE GO. SHE'LL BE REQUIRED TO HAVE FAMILY COUNSELING
AND DRUG COUNSELING AND --
MRS. WHITE: THIS IS ONE, YOUR HONOR, WHERE SHE
AND THE BABY TESTED POSITIVE FOR COCAINE RIGHT AFTER
THE BABY'S BIRTH AND I THINK THEY NORMALLY JUST ORDER
THEM INTO THE SAME TYPE OF THINGS THAT WE'RE TALKING
ABOUT, COUNSELING AND DRUG TREATMENT AND SO FORTH.
MR. GAMBLE: MALISSA'S NOW LIVING WITH HER MOTHER
OVER ON BEECHWOOD AVENUE HERE IN ANDERSON AND IS
WORKING WITH THE ADAC ALREADY. SHE HAS WORKED AT RYOBI

AND NOW HAS THREE CHILDREN SO IT'S GOING TO BE
DIFFICULT FOR HER TO WORK TOO.
THE COURT: SHE HAS NO PRIOR CONVICTION RECORD?
MRS. WHITE: JUDGE, SHE HAS A PRIOR POSSESSION OF
MARIJUANA AND DRIVING UNDER THE INFLUENCE FROM 1982.
THE COURT: MS. CRAWLEY, IF I FOLLOW THESE
RECOMMENDATIONS DO YOU UNDERSTAND THAT YOU WILL HAVE TO
SUCCESSFULLY COMPLETE ANY COUNSELING AS RECOMMENDED FOR
SUBSTANCE ABUSE? IF YOU VIOLATE THAT YOU COULD SERVE
TIME. DID YOU UNDERSTAND THAT?
MS. CRAWLEY: YES SIR.
THE COURT: I'M GOING TO SENTENCE YOU AS FOLLOWS:
FIVE YEARS: FIVE YEARS SUSPENDED ON FIVE YEARS
PROBATION -- SPECIAL CONDITIONS OF FIVE YEARS PROBATION
YOU WILL BE REQUIRED TO SUCCESSFULLY COMPLETE ANY
COUNSELINGS RECOMMENDED FOR SUBSTANCE ABUSE, COMPLY
WITH ANY FAMILY COURT ORDERS AND ALSO BE RANDOMLY DRUG
TESTED IN THE DISCRETION OF YOUR PROBATION AGENT.
COSTS AND ASSESSMENTS AND SUPERVISION FEES ARE WAIVED
AND EXEMPT.

DOES MY SENTENCE COMPLY WITH THE NEGOTIATIONS,
MRS. WHITE?

MRS. WHITE: YES SIR.

MR. GAMBLE: YES SIR.

THE COURT: THANK YOU.

[PAGE 7 OF 7]

CERTIFICATE OF REPORTER

I, SUSAN AHEARN-HAWKINS, CVR, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD IN THE CAPTIONED CASE, TO THE BEST OF MY SKILL AND ABILITY, RELATIVE TO APPEAL, IN THE CRIMINAL COURT FOR ANDERSON COUNTY, SOUTH CAROLINA, ON JANUARY 6, 1992.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

"s/ Susan Ahearn-Hawkins"

DATED: October 7, 1994

THE STATE OF SOUTH CAROLINA,
COUNTY OF ANDERSON

COURT OF GENERAL SESSIONS

JAN 6 1992 TERM _____

DDW

THE STATE

vs.

MALISSA ANN CRAWLEY

Indictment for

UNLAWFUL NEGLECT OF A CHILD
20-7-50
20-7-490

NEGOTIATED PLEA

[PANEL 2 OF 3]

WITNESSES

JIMMY McKINNEY, APD

ARREST WARRANT NO. D201991

ACTION OF GRAND JURY

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury *Date:*

[PANEL 3 of 3]

Now comes the defendant Malissa Ann Crawley who in open Court waives presentment and pleads guilty to the charge in the [illegible] in the within indictment and consents to sentence.

This 6 day of January 1992

Signed "s/ Malissa Crawley"

[Page 2 of 2]

FORM 32 (12/87)

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	UNLAWFUL
COUNTY OF ANDERSON	)	NEGLECT OF A CHILD
		2-7-50/20-7-490

At a Court of General Sessions, convened on JAN 6 1992, the Grand Jurors of ANDERSON County present upon their oath:

THAT MALISSA ANN CRAWLEY, A PERSON HAVING LEGAL CUSTODY OF ANTWON LORENZO CRAWLEY, A CHILD BORN NOVEMBER 9, 1991, DID IN ANDERSON COUNTY ON OR BETWEEN AUGUST 8, 1991 AND NOVERMBER 9, 1991, WITHOUT LAWFUL EXCUSE REFUSE OR NEGLECT TO PROVIDE THE PROPER CARE AND ATTENTION FOR ANTWON LORENZO CRAWLEY SO THAT THE LIFE, HEALTH, OR COMFORT OF ANTWON LORENZO CRAWLEY WAS ENDANGERED OR LIKELY TO BE ENDANGERED, TO WIT: 1) MALISSA ANN CRAWLEY INFLICTED UPON ANTWON LORENZO CRAWLEY PHYSICAL OR MENTAL INJURY AND/OR 2) MALISSA ANN CRAWLEY FAILED TO PROVIDE ANTWON LORENZO CRAWLEY WITH ADEQUATE SHELTER.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

"s/George M. Ducworth"
TENTH CIRCUIT
SOLICITOR